Diamond Electric Manufacturing Corporation *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7–CA–41236 and 7–CA–41918

April 14, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 20, 2001, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and moved to reopen the record. The General Counsel and the Charging Party filed answering briefs and briefs in opposition to reopening the record. The Respondent filed a reply to the General Counsel's answering brief and responded to the briefs opposing the reopening of the record.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent committed two unfair labor practices in violation of Section 8(a)(1) and (3) after signing a settlement agreement and a Stipulated Election Agreement with the Union. As a result of these postsettlement violations, the judge concluded that the Regional Director had correctly set aside the parties' settlement agreement. The judge further found that the Respondent committed numerous violations of Section 8(a)(1) and (3) by its presettlement conduct. Based on the presettlement and postsettlement violations, the judge concluded that a *Gissel* bargaining order was necessary. See *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). For the reasons explained below, we adopt the judge's decision only with respect to one of the two postsettlement violations found by the judge and conclude that this isolated violation does not warrant setting aside the settlement agreement and imposing a *Gissel* order.[3]

A. Factual and Procedural History

The Respondent is a manufacturer of ignition coils for cars in Dundee, Michigan. In July 1998, the Union began a campaign at the Respondent's Dundee facility to organize the full-time and regular part-time production and maintenance employees. On August 3, 1998, the Union filed a representation petition with the Board.

The Respondent opposed the Union, which then filed unfair labor practice charges with the Board. On November 30, 1998, the General Counsel issued a complaint that, as amended, alleged that the Respondent unlawfully interrogated numerous employees, threatened several employees with job loss, created the impression that employees' union activities were under surveillance, and maintained and promulgated unlawful work rules. In addition, the complaint alleged that the Respondent changed the breaktime of one employee and transferred another because of their union activism and issued reprimands to and otherwise harassed the foremost union supporters because of their union activities.

A representation election was held on September 24, which the Union lost. The Union filed objections to the election, and, on January 27, 1999,[4] the parties signed a stipulation setting aside the election and agreeing to hold a new election on April 29. The parties also entered into an informal settlement agreement to settle the Union's charges. The Regional Director approved both agreements on February 1.

On March 18, the Respondent discharged union supporter Robert Bomia. On March 23, the Respondent gave union activist Peggy Heiden a final warning. The Union filed charges on April 1, alleging, inter alia, that the Respondent had unlawfully discharged Bomia and issued a final warning to Heiden because of their respective union activity. On June 23, the Regional Director set aside the settlement agreement in light of his finding merit to the newly filed charges and issued a second amended consolidated complaint, incorporating the presettlement and postsettlement allegations against the Respondent.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's credibility determinations, however, we do not rely on his finding that Supervisor Sherry Nevins "lied under oath" as a basis for entirely discrediting her. The judge failed to explain exactly what Nevins lied about or why he thought she had lied. We rely, instead, on the judge's crediting of other witnesses over Nevins and his overall assessment of the demeanor of the witnesses.

[3] Because we decline to issue a *Gissel* order in this case for the reasons stated below, we find it unnecessary to decide whether the judge properly allowed the General Counsel to amend the complaint at the hearing to include an allegation of the Union's majority status and an express request for a bargaining order. For the same reason, we need not rule on the Respondent's motions to reopen the record to adduce additional evidence regarding the Union's majority status and turnover at the Respondent's Dundee facility; all of the proffered evidence relates to the appropriateness of a bargaining order.

[4] Henceforward, all dates refer to 1999.

B. Discussion

Although the judge concluded that the Respondent had committed both presettlement and postsettlement violations of the Act, we find that the case turns on the two allegedly unlawful actions taken by the Respondent after it entered into the informal settlement agreement with the Union: (1) the discharge of Robert Bomia, and (2) the final warning given to Peggy Heiden. While we[5] agree with the judge that Heiden's final warning was unlawful, we[6] find that the discharge of Bomia was not unlawful. Our reasons follow.

1. Discharge of Robert Bomia

a. Facts

On March 17, Robert Bomia, a known union supporter, was assigned to work the midnight shift on the rail coil assembly line with a coworker, Shannon Purkey. The rail coil line has two workstations. At the first station, the worker places bobbins in the coil casing and sends the part into a machine that wraps wire onto the bobbins. The part then enters a soldering machine, which solders the wires at various points and passes the part to the second station for visual inspection and testing. Purkey worked at the inspection station of the line for the first 4 hours of the shift, and Bomia worked at that station for the rest of the shift. At the end of the shift, an employee on the next shift pointed out to Bomia that a number of the coils were improperly soldered and reported the problem to Bomia's supervisor, Bryan Kilburn. After a half-hour investigation, Kilburn estimated that there were 300 defective parts, all of which Respondent managed to salvage.

Kilburn recommended to Human Resources Manager Gene Bialy that Bomia be discharged for the error discussed above. Bomia was summoned to Bialy's office but, before Bomia arrived, Bialy consulted with Plant Manager Paul Lefief about the matter. Lefief told Bialy that if Bomia could not provide an explanation for the production line error, he would support the recommendation that Bomia be discharged. Bialy then met with Bomia. He asked Bomia to explain what caused the previous night's error on the line. After Bomia stated that he had no explanation for the error, Bialy informed him that he was discharged for the error. Bialy also told Bomia that his discharge was based on his "problems in the past." Bomia understood this as a reference to the fact that 3 months earlier, his probationary hire period had been extended 30 days (ending in February) due to dishonest conduct on the job, discussed more fully below.

b. Analysis and conclusion

To establish that Bomia's discharge was unlawful, the General Counsel must show, by a preponderance of the evidence, that his union activity was a motivating factor in the Respondent's termination decision; once the General Counsel has made this showing, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983). Even in the absence of direct evidence of animus, extant Board precedent provides that unlawful motivation may, in appropriate cases, be inferred from circumstantial evidence, including evidence that the employer's stated reason for its action was a pretext—that is, either false or not in fact relied upon. See, e.g., *Whitesville Mill Service Co.,* 307 NLRB 937 (1992); *Fluor Daniel, Inc.,* 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992).

In finding that the General Counsel met his burden of showing unlawful motivation, the judge relied on evidence that other employees who had made similar or more serious on-the-job errors than Bomia's were not discharged,[7] and on his finding that Bomia had not been certified to perform the particular task to which he was assigned when his error occurred. In exceptions, the Respondent argues that this evidence fails to meet the General Counsel's burden of showing that Bomia's discharge was unlawfully motivated. We find merit in this exception.

As noted above, the judge found that the discharge of Bomia was unlawful. Our dissenting colleague agrees with the judge and, in doing so, relies on the same evidence of unlawful motivation that the judge relied upon. In addition, however, she relies on alleged 8(a)(1) and (3) violations found by the judge as "background evidence of the Respondent's anti-union animus" toward Bomia,

[5] Chairman Battista and Member Liebman agree on the Heiden violation. Member Schaumber finds it unnecessary to pass on whether the Respondent unlawfully issued a final warning to Peggy Heiden. Assuming arguendo that the Respondent did so, he finds that this violation is insufficient to warrant setting aside the settlement agreement.

[6] Chairman Battista and Member Schaumber agree as to the Bomia discharge. In her separate opinion, Member Liebman dissents.

[7] The judge relied primarily on three instances of allegedly disparate treatment. First, Purkey, who worked on the inspection station of the rail coil line for the first half of the shift, received an oral warning. Second, Wayne Jeffers received an oral warning when his failure to catch improperly soldered coils resulted in 688 pieces of scrap. Finally, Chad Naugle was not discharged after his failure to correctly reassemble a mold caused 580 parts to be recalled from the customer as defective; he received a written warning as a result of this error and three subsequent performance errors that caused damage to the molds or produced defective parts.

notwithstanding that these violations were encompassed by the informal settlement agreement discussed above. We reject this "evidence" for two reasons. First, the judge himself did not rely on these alleged presettlement violations to find the Bomia discharge unlawful. Second, as a matter of law, our colleague is precluded from relying on the alleged presettlement violations as evidence of Respondent's union animus. The informal settlement agreement signed by the Respondent and the Union contained a nonadmission clause and the agreement expressly settled all the alleged violations on which our colleague seeks to rely as evidence of the Respondent's animus in this postsettlement portion of the case. As stated in *Steves Sash & Door Co*., 164 NLRB 468, 476 (1967), a "settlement agreement contain[ing] a nonadmission clause . . . 'may not itself be used to establish anti-union animus'" in postsettlement proceedings (citations omitted). See also *Parker Seal Co*., 233 NLRB 332, 335 (1977) ("an informal settlement with a nonadmission clause do[es] not . . . constitute competent evidence of the prior alleged unlawful conduct of the settling party; nor [is it] admissible to show animus" regarding postsettlement conduct).

Our colleague's reliance on *Electrical Workers 613 Local*, 227 NLRB 1954 fn.1 (1977), is not to the contrary. That case applied the rule of *Joseph's Landscaping Service*, 154 NLRB 1384 fn.1 (1965), which, as stated in *Morton's IGA Foodliner*, 237 NLRB 667, 669 (1978), "permits the use of presettlement *conduct* as background evidence to establish a motive or object of the [r]espondent in its postsettlement activities, . . . [but] the latter holding did not extend to permit the introduction of an informal settlement agreement (with a nonadmission clause) itself as direct evidence of such conduct." Thus, we cannot accept the settlement agreement itself to shed light on postsettlement conduct. Nor can we adjudicate the presettlement conduct as unlawful. In this latter regard, we have accepted the settlement, and that acceptance precludes a finding that the presettlement conduct was unlawful.

However, our colleague says that she would rely upon presettlement *facts* to shed light on postsettlement conduct. More particularly, she would rely on such facts to support the inference that Bomia's discharge was unlawfully motivated. We disagree. The presettlement facts did not involve Bomia, and there is no evidence that the Respondent made any statements to Bomia indicative of antiunion animus. We do not, of course, suggest that adjudicated unfair labor practices directed at certain employees cannot constitute evidence of antiunion animus to establish an 8(a)(3) violation as to others. Here, however, no presettlement unfair labor practices have been found.

With respect to the circumstantial evidence that the judge did rely on, we find it insufficient to warrant an inference that Bomia's discharge was unlawfully motivated. First, we agree with the Respondent that the judge erred in finding evidence of disparate treatment here. Unlike other employees who received lesser discipline for assertedly similar on-the-job errors, Bomia had been counseled for dishonest conduct about 3 months before his discharge and just over 2 months after his hire. At that time, Kilburn spoke with him about the fact that he had, on more than one occasion, clocked in early when he was scheduled to be working overtime and, instead of going directly to work, had first gone on break with the employees whose regular shift was in progress. As a result of this misconduct, Kilburn extended Bomia's probationary period. None of the other employees who committed similar on-the-job errors and were treated more leniently had a similar history of dishonest conduct. We conclude that Bomia was not similarly situated to those employees. See *Hoffman Fuel Co. of Bridgeport*, 309 NLRB 327, 329 (1992) (no disparate treatment where employer discharged employee for unauthorized absence from jobsite, although other employees had not been disciplined for same conduct, because other employees did not have past disciplinary history like discharged employee).

Moreover, Bomia admitted that, at his termination meeting, Human Resources Manager Gene Bialy indicated that his discharge was for his performance error *and* for problems in the past. Thus, the Respondent clearly relied on Bomia's disciplinary history, not only his error, in discharging him. As explained, because it included dishonest conduct, that history differentiated him from the other employees who had made similar performance errors.

Our dissenting colleague asserts that the dishonest conduct reason given by Bialy for Bomia's discharge is "unavailing" because it was not relied on by the Respondent in discharging Bomia. The basis for our colleague's assertion is that Plant Manager Lefief, not Bialy, was the "ultimate decision-maker" regarding Bomia's discharge, and Lefief testified that his decision was based on Bomia's "blatant disregard" for his soldering inspection duties. But Lefief's testimony does not render "unavailing" the dishonesty reason given by Bialy for the discharge. Lefief may have been the ultimate decision-maker in Bomia's discharge, but Bialy clearly was an instrumental participant in that outcome. He recommended it. Lefief approved the recommendation. Further, it was Bialy, not Lefief, who communicated the

discharge decision to Bomia, citing Bomia's dishonesty in addition to his production line error.

Our colleague states that "[h]ad Lefief simply rubberstamped Bialy's recommendation, this might be a different case, because then Bialy's reasons would also be Lefief's reasons." Based on Lefief's testimony, we find that he simply concurred, without independent inquiry, with Bialy's discharge recommendation. Lefief did not testify that he was the sole decisionmaker regarding Bomia's discharge. Rather, he testified that he "listen[ed] to what had gone on [and] . . . agreed to the decision." (Tr. 617.)

Thus, this case is not, as our colleague seeks to describe it, one in which a discharge can be found pretextual on the basis of shifting reasons given for it. See, e.g., *U.S. Coachworks, Inc.,* 334 NLRB 955, 957 (2001). Bialy specified two reasons for Bomia's discharge—his production line error and dishonest conduct. Lefief specified the production line error but did not disavow the dishonesty reason mentioned by Bialy. In these circumstances, given that Lefief's discharge decision was based on Bialy's recommendation, it cannot be said that the Respondent did not rely on Bomia's dishonesty as a reason for his discharge.

In inferring unlawful motive, the judge also relied on his finding that Bomia had not been certified on the solder inspection station of the rail coil machine. Contrary to the judge, we find that whether Bomia was actually trained is not the issue. The issue is not whether it is "fair" to discharge an employee for poor performance on a job for which he has not been certified. The issue is whether poor performance rather than union activity was the reason for the discharge. Thus, the question is whether Plant Manager Paul Lefief, who ultimately approved the discharge, acted on a reasonable belief that Bomia's error warranted discharge. See *Jordan Marsh Stores Corp.,* 317 NLRB 460, 476 (1995), and *Goldtex, Inc.*, 309 NLRB 158 fn. 3 (1991) (for the proposition that a respondent has not acted unlawfully if it shows that it discharged an employee based on a reasonable belief that the employee had engaged in conduct warranting discharge). We relied on this precedent recently in *Framan Mechanical, Inc.,* 343 NLRB 408, 416 (2004), to find that the respondent therein lawfully disciplined two employees (Harris and Lanza) based on a reasonable belief that they, like Bomia, "performed work improperly."

Our dissenting colleague states, however, that during Lefief's discussion with Bialy about whether Bomia should be discharged, a question arose as to whether Bomia had received adequate training on the production line to spot the error and, therefore, in light of this uncertainty, Lefief could not have held a reasonable belief that Bomia had disregarded his duties. But this contention overlooks the fact that Bomia was provided the opportunity to clear up the uncertainty about whether a training inadequacy was the cause of the production line error. As noted above, following the mishap on the line, Bomia was invited to an interview and was asked to explain what happened. If he lacked the training necessary to prevent the production line failure, he certainly did not offer that lack as a reason for the failure. Nor did he provide any other reason. He simply acknowledged the production line error, and only then did the Respondent decide to discharge him.

The foregoing is significant because the "failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" may, under appropriate circumstances, constitute an indicia of discriminatory intent. *K&M Electronics,* 283 NLRB 279, 291 fn. 45 (1987). The Board has considered this factor in several recent cases to find discharges unlawful where employees were denied the opportunity to provide a potentially exculpatory explanation prior to being discharged,[8] and to dismiss allegations of unlawful discharge where such an opportunity was provided.[9] We conclude, therefore, that because Bomia failed to avail himself of the opportunity given to him by the Respondent to explain his production line error and what role, if any, lack of training may have played in it, the judge's finding and our colleague's contention that Bomia's discharge was unlawful are unsupported by the record.

Because the General Counsel failed to demonstrate that Bomia's discharge was unlawfully motivated, we find that the Respondent did not violate Section 8(a)(1) and (3).

2. Final Warning Issued to Peggy Heiden[10]

a. Facts

On March 16, a temporary employee was assigned to union activist Peggy Heiden's production line. After

[8] *Sociedad Espanola De Auxilio Mutuo y Beneficencia De P.R.,* 342 NLRB 458, 459–460 (2004) (discharge of Romero unlawful where respondent "simply accepted the complaints [about Romero] as true, without affording Romero an opportunity to refute them"); *Rockline Industries,* 341 NLRB 287, 293 (2004) (discharge of employee Kennan for union solicitation during worktime unlawful where "Kennan was not asked for his version of the encounter" which indicated that solicitation lawfully took place during breaktime).

[9] *Caesar's Atlantic City*, 344 NLRB 984, 999 and fn. 44 (2005) (discharge of employee LoManto lawful where he was "afforded 2-1/2 hours to write his account of the March 5 events [for which he was discharged], . . . suggest[ing] that management wished to give him the opportunity to make a full written presentation of his side of the story").

[10] Member Liebman joins this portion of the Board's opinion.

another line worker complained that the temp was slowing down production, Production Manager Steve Burnett removed him from the line. The next morning, however, Burnett again assigned the temp to Heiden's line. The other line workers again complained, this time to Nathan Iott, who was temporarily in charge of the line, and who again removed the temp. Shortly thereafter, Sherry Nevins, who was the line supervisor, but was on light duty in the human resources office for medical reasons, placed the temp back on the line. Heiden paged Burnett and Iott in order to have the temp removed, but Nevins answered the page and told her that the temp would remain on the line because they needed his help.

Nevins then came onto the production floor and told Heiden she needed to speak with her in the human resources office. Nevins began a loud discussion with Heiden about her behavior in paging Burnett and Iott, asserting that she was still under Nevins' supervision. Heiden stated that Nevins' supervisor, Burnett, had informed her that Nevins was no longer her supervisor because she was on light duty. Heiden asked that Human Resources Manager Bialy be present for the remainder of their discussion, but Nevins refused. As the intensity of the discussion increased, Heiden mouthed to several employees standing near the office, who observed the heated confrontation through an office window, to call Bialy. According to Heiden, Nevins shoved her when she refused to sit down and again when she attempted to leave the office, but finally allowed her to leave.

That evening, Bialy called Heiden at home to discuss the incident. He spoke with the Monroe County deputy sheriff, whom Heiden had contacted because she believed Nevins had assaulted her.[11] Bialy told him that the confrontation had evolved out of Heiden's union activities. The next day, Bialy and Lefief suspended Heiden and Nevins with pay in order to investigate the incident.

As a result of the investigation, Heiden received a final warning and Nevins received a written warning. Heiden's warning reprimanded her for a "pattern of behavior" and stated nine bulleted reasons for the discipline, including "[d]isruptive activity in the workplace[;] [d]isrespectful conduct toward supervision[;] [s]ubstandard and intentionally poor work performance[;] . . . [a]ttempting to reassign work assigned to you, or take over work assigned to another employee[;] [r]efusing to perform tasks assigned to you[;] [e]ncouraging other employees to 'slow-down' their work." In exceptions, the Respondent asserts that Heiden's discipline was "primarily for her insubordinate action" in reassigning the temp contrary to Nevins' wishes, and that Nevins' discipline was "for her irrational response to Heiden's insubordination."

b. Analysis and conclusion

We agree with the judge that the General Counsel demonstrated that the Respondent's animus toward Heiden's union activity was a motivating factor in issuing the final warning. Thus, the record shows that the Respondent demonstrated sustained antiunion animus against Heiden. As the judge found, Nevins repeatedly interrogated and threatened Heiden about her active support for the Union and told Heiden several months prior to the temp incident that she would never stop harassing Heiden. This evidence—combined with Human Resource Manager Bialy's statement that the confrontation evolved from Heiden's union activities, undermine the bona fides of Respondent's investigation prior to the discipline, and they support the view that the Respondent's stated reasons for the discipline were pretextual. We, thus, conclude that the discipline was unlawfully motivated.

Bialy's statement to the deputy sheriff—that the confrontation between Nevins and Heiden evolved from Heiden's union activities—is strong evidence that Heiden's discipline was unlawfully motivated. As the judge found, Nevins had been harassing Heiden for her union activism for months prior to the temp incident. Nevins had promised that the harassment would never stop. Nevins then seized on the temp incident to confront Heiden. The temp incident, in turn led to the confrontation with Heiden and to the final warning issued to Heiden. Bialy's awareness of the situation is evident from the fact that he identified the source of the confrontation to the deputy sheriff as Heiden's union activities. In this context, we find that Bialy's statement was essentially an admission that Heiden's discipline was motivated by her union activity.

Furthermore, we agree with the judge that the particular facts of this case raise substantial doubts as to legitimacy of Respondent's investigation of the temp incident prior to disciplining Heiden, providing additional corroborative evidence of unlawful motive. While Lefief and Bialy stated at the hearing that they viewed Heiden's behavior as insubordinate because she had herself reassigned the temp, Bialy acknowledged that he did not actually know whether Heiden had done so.[12] No one from

[11] Heiden did not file criminal charges against Nevins and did not indicate to Bialy, in the course of their conversation, that she intended to do so.

[12] Lefief and Bialy testified that their belief was based on the report of Nevins, who by her own account was not present when the temp was actually moved. The Respondent now argues that whether or not Heiden herself reassigned the temp, her conduct in seeking his removal by supervisors other than the one who had made the assignment was nev-

Heiden's line was interviewed during the investigation to determine if Heiden had done so, and the judge found "no credible evidence" to support that assumption.[13] Although the Respondent now asserts that Heiden's insubordinate conduct regarding the temp was its primary reason for the discipline, Bialy testified that there was nothing wrong with contacting supervision to request a temp's removal, as Heiden—and others—had done. Thus, the investigation failed, by Bialy's own admission, to provide a reasonable basis for the conclusion that Heiden had in fact behaved insubordinately.

The record makes clear that the Respondent's stated reasons for Heiden's discipline are pretextual. As indicated above, there was no basis for the Respondent to conclude that Heiden had been insubordinate regarding the temp reassignment, and, although the final warning refers to a "pattern of behavior," there is no documentation in Heiden's personnel file of any previous misconduct. Moreover, the fact that the Respondent now relies on "insubordination," rather than the list of misconduct stated in the warning, is in itself evidence of pretext. See, e.g., *Aratex Services*, 300 NLRB 115, 116 (1990). Finally, as the judge found, the Respondent failed to give Heiden notice or any opportunity to respond to the matters alluded to in the final warning. As stated above in discussing the Bomia discharge, an employer's failure to permit an employee to defend herself before imposing discipline may, under appropriate circumstances, constitute evidence of pretext that supports an inference of unlawful motive. Given the substantial other evidence indicative of a sham investigation, such an inference is appropriate here.

The Respondent's assertion that Heiden's discipline was in any case justified by the fact that she sought to have a temp assigned by one supervisor removed by another is unavailing. The Respondent cannot rebut a showing of unlawful motivation simply by pointing to a potentially legitimate reason for its adverse action. Rather, it must show that it would have taken the same action absent Heiden's union activism. *T & J Trucking Co.,* 316 NLRB 771, 771 (1995). The Respondent has done neither. Thus, Bialy admitted that there is nothing wrong with contacting supervision to request removal of a temp, as the evidence indicates that Heiden had done. And, the Respondent apparently did not discipline the other line workers, who, when the temp was originally reassigned by Burnett, asked Iott to remove him. The Respondent has not explained why this conduct would have resulted in a final warning for Heiden but not even a reprimand for her coworkers. Finally, having originally based Heiden's discipline on the laundry list of factors included in the warning, the Respondent cannot now plausibly argue that it would have issued the same discipline for insubordination alone, absent her union activities.[14]

Based on the pretext evidence and the evidence of antiunion animus directed at Heiden, we agree with the judge that the General Counsel has shown that the final warning was unlawfully motivated and that the Respondent has failed to demonstrate that it would have taken the same disciplinary action absent Heiden's union activism.

The judge also found, as alleged in the complaint, that the Respondent's suspension of Heiden immediately after the March 17 incident with Nevins was unlawful. We disagree, because we find no evidence that the suspension of Heiden was unlawfully motivated. The record indicates that the Respondent suspended both Nevins and Heiden—both with pay—and that it did so in order to limit further workplace hostilities while it investigated the temp incident. But even if we were to infer that the Respondent's antiunion animus was a motivating factor in the decision, the record supports a finding that the Respondent would have suspended Heiden—as it did Nevins—regardless of Heiden's union activism in order to deal with a potentially explosive situation. We therefore dismiss this allegation of the complaint.

Conclusion

We find that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing the final warning to Heiden, but that its discharge of Bomia was not unlawful. We conclude that Respondent's disciplinary action against Heiden alone is insufficient to warrant overturning the parties' settlement agreement. See *Coopers International Union*, 208 NLRB 175 (1974). We shall therefore reinstate the agreement and dismiss the complaint allegations concerning presettlement conduct.

ertheless insubordinate. As discussed below, the evidence does not support that view.

[13] It is not surprising that the investigation failed to substantiate the Respondent's contention that Heiden was insubordinate. The investigation seems to have been directed at almost anything but Heiden's conduct with regard to the temp incident. The litany of the Respondent's stated grievances against Heiden (see text, above) suggests that the Respondent was seeking to find any possible reason to discipline Heiden, whether or not it concerned the temp incident.

[14] Lefief testified that Heiden's behavior regarding the temp alone would have sufficed to justify discharge because she was insubordinate. But Lefief's testimony was based on his view that Heiden had herself reassigned the temp. He was not asked, as was Bialy, whether contacting supervision to have the temp removed, as the evidence indicates Heiden had in fact done, in itself would have warranted discipline.

REMEDY

Turning now to the remedy, we consider the appropriateness of issuing a *Gissel* order in this case. A *Gissel* order is warranted where the employer's course of conduct "clearly demonstrates that the holding of a fair election in the future would be unlikely and that the 'employees' wishes are better gauged by an old card majority than by a new election'." *M. J. Metal Products,* 328 NLRB 1184 (1999) (quoting *Charlotte Amphitheater Corp. v. NLRB,* 82 F.3d 1074, 1078 (D.C. Cir. 1996)). Even when an employer's unlawful conduct is not "outrageous and pervasive," a *Gissel* order may nevertheless be appropriate based on the extensiveness of the employer's unfair labor practices and "the likelihood of their recurrence in the future." *M. J. Metal,* 328 NLRB at 1184 (quoting *Gissel*, 395 U.S. at 614–615). However, a Gissel bargaining order of either category is an extraordinary remedy. The preferred route is to provide traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by those remedies. The *Gissel* (nonelection) route is to be used only in circumstances where it is unlikely that the atmosphere can be cleansed by traditional remedies.[15]

In this case, we have found only one unfair labor practice, specifically, an instance of discriminatory discipline. This single violation of the Act is neither pervasive nor as "highly coercive" and severe as "hallmark" violations, such as plant closing threats or discriminatory discharges. See *M. J. Metal,* 328 NLRB at 1184 (citing *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980)); *Sunbeam Corp.,* 287 NLRB 996, 999 (1988) (employer's 8(a)(1) violations and a single 8(a)(3) refusal to recall were "isolated incidents" not sufficient to warrant issuing a *Gissel* order). In addition, the Respondent pledged in its settlement agreement with the Union to refrain from future unlawful conduct. We do not find Respondent's single postsettlement violation sufficient to undermine its intention as expressed in the agreement to avoid future violations of the Act. See *Coopers International Union,* 208 NLRB at 175. We therefore decline to issue a *Gissel* order in this case.

ORDER

The National Labor Relations Board orders that Diamond Electric Manufacturing Corporation, Dundee, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing final warnings to employees because they engaged in union activities and to discourage employees from engaging in these and other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order expunge from its records any reference to the March 23, 1999 final warning to Peggy Heiden, and within 3 days thereafter notify her in writing that this had been done and that the unlawful action will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its facility in Dundee, Michigan, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Re-

[15] See, e.g., *Abramson, LLC*, 345 NLRB 171 (2005) (*Gissel* order unwarranted despite respondent's having unlawfully threatened employees with job loss, loss of benefits, and plant closure if union won election); *Hialeah Hospital,* 343 NLRB 391 (2004) (*Gissel* order unwarranted despite respondent's having unlawfully discharged employee in retaliation for union activities, threatened employees with discharge and other unspecified reprisals, created impression of surveillance, implied that support for union would be futile, solicited employee to dissuade other employees from supporting union and promised him benefits for doing so, enforced rules more strictly, removed benefits, and engaged in unlawful surveillance); *Desert Aggregates*, 340 NLRB 289 (2003) (*Gissel* order unwarranted despite respondent's having unlawfully laid off two union supporters and solicited and promised to remedy employee grievances in unit of 11 employees); *Aqua Cool*, 332 NLRB 95 (2000) (*Gissel* order unwarranted despite respondent's having, in unit of eight employees, unlawfully solicited grievances from employees and promised to remedy them, threatened employees that they were likely to lose their benefits and that respondent would bargain from scratch if employees elected union representation, implied to employees that voting for union would be futile, threatened employee that facility would close and implied that jobs would be lost, granted employees benefit by hiring warehouse worker to perform tasks formerly assigned to drivers, and granted new benefits to its drivers and improved their terms and conditions of employment by awarding them new routes on basis of seniority and by ceasing to harass them for taking sick leave); *Burlington Times, Inc.,* 328 NLRB 750 (1999) (*Gissel* order unwarranted despite respondent's having unlawfully threatened to close plant, made noneconomic grants of benefits, promised to improve wages and other benefits, and solicited grievances, in unit of 11 employees).

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 23, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting in part.

Shortly after it settled a dozen or more allegations of unlawful conduct and pledged to obey the Act, the Respondent renewed its unfair labor practices. As Chairman Battista and I agree, the Respondent issued a final warning to one union activist (Peggy Heiden), after a cursory investigation, in connection with an incident involving a supervisor whose antiunion motivation was essentially admitted by the Respondent's human resources manager. In my view, contrary to my colleagues, the Respondent also seized upon the production-line error of an untrained union supporter (Robert Bomia) to discharge him, although the comparable errors of other employees had been tolerated. Based on these incidents, the judge was correct to set aside the settlement agreement and to find that the Respondent's presettlement conduct violated the Act. In turn, a *Gissel* bargaining order is warranted here.

I.

The Respondent asserts that it discharged Bomia on March 18 for his failure to correctly inspect the soldering on rail coils that he and a coworker, Shannon Purkey, produced during the March 17 night shift. But, the extensive evidence of the Respondent's antiunion animus, and the evidence that Bomia was treated more harshly than his coworker on the night of the incident and than other employees who made more serious on-the-job errors, warrant an inference of unlawful motive. Moreover, the Respondent has not shown it would have taken the same action absent Bomia's union activities. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

The Respondent's antiunion animus is well documented. As the judge found, prior to signing the settlement agreement, the Respondent violated Section 8(a)(1) of the Act on at least 12 separate occasions by promulgating and maintaining unlawful work rules, by interrogating or threatening employees, and by creating an impression of surveillance of employees' union activities. In addition, the Respondent committed five violations of Section 8(a)(1) and (3) by changing a union-activist employee's breaktime so that she took breaks alone, transferring one of the foremost union supporters without explanation, and discriminatorily disciplining and otherwise harassing the most active union supporters. These presettlement violations provide substantial background evidence of the Respondent's antiunion animus, which bears on the Respondent's postsettlement conduct. *Electrical Workers Local 613,* 227 NLRB 1954 fn. 1 (1977).[1]

The majority asserts nonetheless that the Respondent's abundant antiunion animus cannot support a finding that Bomia's discharge was unlawfully motivated because there is no evidence that it was specifically directed at Bomia. Board law does not support such a requirement. *Becker Group, Inc.,* 329 NLRB 103, 104–105 (1999). See also *Sherwin-Williams Co.,* 313 NLRB 163 fn. 5 (1993) (citing *Whitesville Mill Service Co.,* 307 NLRB 937 (1992)).

Further, the disparate treatment evidence found by the judge strongly suggests that Plant Manager Paul Lefief's stated reason for discharging Bomia—the March 17 error that resulted in 300 improperly soldered parts—was a pretext. Thus, Wayne Jeffers failed to catch 688 improperly soldered parts while working on the rail coil line, as compared with the 300 parts missed by Bomia, and received only an oral warning. Mold maintenance employee Chad Naugle received only a written warning after he made an error that resulted in 580 defective parts being shipped out and then recalled from a customer. According to his warning, Naugle's disciplinary history was more extensive than Bomia's, including four incidents in as many months of Naugle's damaging molds or causing scrap parts to be produced as a result of carelessness. Finally, Bomia's coworker on the night of the incident, Shannon Purkey, who was certified on the rail coil line and worked the inspection station for the first half of the shift, received only an oral warning for the incident, although the Respondent acknowledged in the warning that "[w]e are unable to determine at what point the solder machine had failed during the shift." There is no evidence of any other employee having been discharged for a first on-the-job error.

[1] As explained in part II, below, I would approve the Regional Director's action setting aside the parties' settlement agreement, and I would affirm the violations the judge found based on presettlement conduct. The majority, however, has reinstated the settlement agreement, which precludes finding any presettlement violations. Nevertheless, the Board may rely on a respondent's presettlement *conduct* as evidence of animus in its postsettlement actions, even though the Board has not found the presettlement conduct unlawful. See *Local 613*, supra, 227 NLRB 1954 fn. 1. Here, I would rely on the Respondent's presettlement conduct as evidence of animus. (The settlement agreement itself, of course, does not constitute evidence of animus.)

My colleagues assert that Bomia's discharge for his error cannot be compared with the lesser discipline meted out to other employees because Bomia had previously been disciplined for dishonest conduct.[2] This distinction is unavailing, because the Respondent did not rely on it in firing Bomia. Plant Manager Lefief, who the judge found was the ultimate decisionmaker, testified that his decision resulted from Bomia's "blatant disregard" of his solder inspection duties on March 17. Lefief expressly testified that Bomia's work history played no part in the decision to terminate him.

The majority cites the testimony of Human Resources Manager Gene Bialy that Bomia was discharged in part because of his previous "dishonesty." That is what Bialy told Bomia, and Bialy may have relied in part on that conduct when recommending Bomia's discharge. But Lefief, not Bialy, made the final decision to fire Bomia, and by his own admission, Lefief did so only because of Bomia's production error on the night of March 17–18.[3] In relying on Bialy's testimony to find that other factors contributed to the final discharge decision, the majority relies on the testimony of a witness who did not make the final decision.

The judge's finding that Bomia was not fully trained in both aspects of the rail coil process further indicates that the Respondent seized on Bomia's error as a pretext for discharging him. The judge credited Lefief's testimony that there had been problems with the solder machine on the rail coil line since December 1998 and that employees had to be retrained to better manage these problems. However, Bomia's personnel file did not contain a certification of training for the solder inspection station of the rail coil line, and the judge discredited the testimony of Bomia's supervisor, Bryan Kilburn, that he had personally trained and certified Bomia on the inspection station.[4] Apparently, the Respondent assigned Bomia to run the rail coil machine, notorious for its technical problems, although he had not been fully trained to perform this work.[5]

The majority asserts that the issue here is not whether Bomia had been adequately trained, but whether Lefief reasonably believed that he had received such training. Because Lefief held such a belief, Bomia's discharge was an appropriate penalty for neglect of his job duties. The majority observes that the Respondent gave Bomia an opportunity to explain what went wrong on the night of March 17–18 and that he failed to say that he had not been properly trained.

This reasoning does not withstand scrutiny. First, even if Lefief reasonably inferred that Bomia had been trained on the rail coil line, coworker Purkey (who was fully trained) received only an oral warning, while Bomia was fired. The majority fails to explain how Lefief could honestly have believed that Bomia's error warranted discharge while Purkey's identical error did not.

Second, the record does not support the majority's finding that Lefief held a reasonable belief that Bomia had been trained. As the judge found, the credible evidence establishes that Bomia had not been fully trained on the rail coil line *and that Lefief knew it when he approved Bomia's discharge*. Lefief admitted that during his discussion with Bialy and Kilburn concerning what discipline would be appropriate, someone informed Lefief, correctly, that Bomia had not been trained. Although Lefief testified that Kilburn claimed that he had trained Bomia, the judge discredited that testimony. Thus, there is no credited evidence that anyone said anything to Lefief that would have cast doubt on the statement that Bomia had not been trained.

At the very least, the statement to Lefief that Bomia had not been trained must have raised a serious doubt on that score in Lefief's mind. Thus, Lefief could not honestly have believed that Bomia had "blatantly disregarded" his responsibility by failing to catch a problem he might not have known how to detect. Under similar mitigating circumstances, the Respondent issued only an oral warning.

Lefief testified that Wayne Jeffers was given only an oral warning when he failed to catch 688 improperly soldered rail coils in December 1998 because the Respondent had just discovered the problems with the soldering machine and could not have expected Jeffers to be skilled at detecting and managing them. Thus, the Re-

[2] Bomia's supervisor, Bryan Kilburn, extended Bomia's probationary period for clocking in prior to actually starting work. The majority characterizes this misconduct as dishonest but the Respondent did not apparently view it as sufficiently serious to warrant documenting it in Bomia's personnel file.

[3] Had Lefief simply rubber-stamped Bialy's recommendation, this might be a different case, because then Bialy's reasons would also be Lefief's reasons. However, that is not what happened here.

Contrary to the majority's claim, I do not accuse the Respondent of offering shifting reasons for Bomia's discharge. I simply find that when Lefief, who made the decision to fire Bomia, admitted that he did so solely because of his production error, Lefief (and not Bialy) was speaking for the Respondent.

[4] The judge rejected as incredible Kilburn's assertion that he discarded the rail coil certification document after Bomia was discharged, as there was no evidence that such documentation was ever discarded except for employees who quit before completing their training.

[5] Although Lefief testified that the Respondent had found ways of addressing many of the solder machine's technical problems by the time of Bomia's oversight, a malfunction in the solder machine caused the soldering problem on Bomia's shift. It is not at all clear that Bomia would have been skilled in identifying or handling such a problem without having been certified in the rail coil process.

spondent clearly took into account the reasonableness of expecting Jeffers to know what to look for and how to handle malfunctions. Yet, it failed to do so when faced with a doubt as to whether Bomia had been adequately trained to handle the same problems.

The majority infers lawful motivation from the fact that the Respondent offered Bomia an opportunity to explain his production error. This fact, however, does not overcome the pervasive evidence, detailed above, that the Respondent seized on Bomia's error as an excuse to get rid of a known union advocate. Given this evidence and the Respondent's numerous other unlawful acts, the Respondent's letting Bomia give his side of the story does not undermine the judge's finding that Bomia's discharge was unlawfully motivated.

Nor has the Respondent shown that it would have discharged Bomia absent his union activities. When asked about his reasons for the discharge decision, the final-decision maker, Lefief, testified that the basis was the inspection error. Yet Lefief admitted that a question arose about whether Bomia was even trained to perform inspection on the rail coil line. Moreover, the Respondent failed to explain why it gave only an oral warning to Bomia's shift partner, Purkey, although the warning expressly acknowledged that it was unclear when during the shift the problem arose and hence presumably unclear whether the error occurred under Purkey's or Bomia's inspection duty. This evidence, together with the Respondent's more lenient treatment of other employees who made more serious production errors, makes clear that the Respondent's justification for discharging Bomia was a pretext. *Shattuck Denn Mining Corp.,* 151 NLRB 1328, 1336 (1965), enfd. 362 F.2d 466 (9th Cir. 1966); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

II.

Because the Respondent, by its unlawful discharge of Bomia and unlawful disciplining of Heiden, breached the terms of its settlement agreement with the Union, that agreement was correctly set aside. *R. T. Jones Lumber Co.,* 303 NLRB 841, 843 (1991).[6] Moreover, I agree with the judge that the Respondent committed a substantial number of unfair labor practices prior to the settlement. The severity of the Respondent's unlawful conduct taken as a whole, and the Respondent's persistence in violating the Act, establish the need for a *Gissel* bargaining order as recommended by the judge. See *General Fabrications Corp.,* 328 NLRB 1114, 1115 (1999), enfd. 222 F.3d 218 (6th Cir. 2000) (employer's continuing postelection violations strongly indicate that its unlawful conduct will continue in the event of another organizing effort); *Garney Morris, Inc.,* 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995) (same).

[6] In their settlement agreement, the parties agreed to "comply with all the terms and provisions of [the] Notice." The notice stated that the Respondent would not "do anything that interferes with [the employees Section 7] rights" and would not "take adverse action against, counsel or otherwise discriminate against employees . . . because of their activities on behalf of or in support of the Union or other protected concerted activities." Obviously, by its discharge of union supporter Bomia and issuing of a final warning to Heiden as a result of their union activism, the Respondent contravened its obligations as expressed in the notice.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue written final warnings to employees because they engaged in union activities or to discourage them from engaging in these and other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights as stated above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful final warning issued to Peggy Heiden and, WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful action will not be used against her in any way.

DIAMOND ELECTRIC MANUFACTURING CORPORATION

A. Bradley Howell, Esq., for the General Counsel.
Theodore R. Opperwall, Esq. (Kienbaum, Opperwall, Hardy & Pelton, P.L.C.), of Birmingham, Michigan, for the Respondent.
Georgi-Ann Bargamian, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. On June 23, 1999, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued an Order, which vacated an informal settlement agreement, consolidated cases, and was a second amended consolidated complaint and notice of hearing. The second amended consolidated complaint (the complaint) (a) refers to a charge filed by the International Union, United Automobile, Aerospace and Agricultural implement Workers of America (UAW), AFL–CIO (the Union) in Case 7–CA–41236 filed on August 3 which was amended on October 9, 1998, and a charge filed by the Union in Case 7–CA–41918 which was filed on April 1 and amended on April 13 and May 19, 1999, (b) alleges numerous violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by Diamond Electric Manufacturing Corporation (Respondent), and (c) indicates in paragraph 26 thereof that

> The [a]cts and conduct described above . . . are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representative, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order . . . than by traditional remedies alone. The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices herein alleged.

In its answer to the order and complaint, the Respondent argues that the Regional Director lacks authority under Board and court precedent to vacate the parties' informal settlement agreement; that it and the Union had a bilateral stipulation to set aside election and agreement to conduct second election; that the stipulation specifically addressed and disposed of certain of the allegations now reasserted by the Regional Director; that the Union caused the cancellation of the second election in contravention of its agreement in the stipulation, and now improperly seeks relief precluded by its own stipulation; that it did not violate the Act as alleged in the second amended consolidated complaint; that, as affirmative defenses, certain of the allegations in the amended consolidated complaint are precluded by 10(b)'s charge-filing/timeliness requirements, are precluded by the prior settlement and stipulation, and have been rescinded or otherwise remedied pursuant to the prior settlement; and that each of the actions complained of in the amended consolidated complaint was motivated by legitimate business considerations.

A hearing on these consolidated cases was held before me in Detroit, Michigan, on December 6, 7, and 8, 1999, and on February 7, 8, 9, and 10, 2000.[1] Upon the entire record in this proceeding, including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent in April 2000, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Dundee, Michigan, is engaged in manufacturing components for the automotive industry. The complaint alleges, the Respondent admits, and I find that at all times material, the Respondent has been an employer engaged in com-

[1] At the beginning of the first day of the 7-day hearing counsel for the General Counsel moved with GC Exh. 4 to amend the complaint to add the following:

> 7(b) In or about the period from July 27, 1998 until September 2, 1998 a majority of the employees in the Unit described in paragraph 7 above designated the Charging Party as their exclusive representative for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

Also, counsel for the General Counsel moved to amend the affirmative portion of the prayer for relief by adding the following:

> 2(h) Recognize and upon request meet and bargain in good faith with the Charging Party as the exclusive collective bargaining agent of the employees in the Unit with respect to wages, hours and other terms or conditions of employment.

As noted above, par. 26 of the complaint already requested the issuance of a bargaining order. Counsel for the General Counsel indicated that the complaint did not originally plead majority status, which was an oversight, but the Respondent was placed on notice a week before the hearing commenced and counsel for the General Counsel contended that it was a timely amendment and it did not substantially change the complaint. The Respondent argued that it was surprising that this issue would be brought up a few days before the trial; that the Board in a similar case, *New York Post Corp.*, 283 NLRB 430 (1987), found that "where the General Counsel had been aware of a theory that was not advanced in the complaint or a problem, a claim, in effect, to use a cliche, had hidden the ball and then popped it on the Respondent during the trial [and] allowing the amendment was improper in those circumstances." Tr. 14. In *New York Post Corp.*, supra, the General Counsel first moved to amend the complaint on the last day of a 3-day hearing. There the Board indicated that it did not share the judge's confidence in finding that the Respondent was not prejudiced by the 11th hour amendments. There the Board indicated that the Respondent may have been misled about the nature of the evidence required for its defense. That is not the case here. Here, the Respondent was placed on notice by par. 26 in the June 23, 1999 complaint that the General Counsel was seeking the issuance of a bargaining order; that the employees' sentiments regarding representation had been expressed through authorization cards; and that the involved unfair labor practices were so serious and substantial in character that the possibility of conducting a fair election by use of traditional remedies was slight. Here on the first day of the hearing on December 6, 1999, almost 6 months after the issuance of the complaint, the General Counsel did not surprise the Respondent with an amendment which he gave the Respondent notice of in advance of the commencement of the hearing. The amendment does not change the General Counsel's theory and the Respondent was not misled about the nature of the evidence required for its defense. The Respondent was not prejudiced by the amendment. The motion of the General Counsel to amend the complaint to the extent indicated above was granted. The ruling stands.

merce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

The General Counsel introduced the Respondent's (a) employee handbook which was effective "11/1/97," General Counsel's Exhibit 9, and (b) no-fault attendance policy, General Counsel's Exhibit 10.

On December 18, 1997, the Respondent's employee, Janice Hatcher, received the following discipline record form, Respondent's Exhibit 5:

> For approx. 6–8 weeks Jan has displayed insubordinate and disrespectful behavior which according to our discipline policy is considered a major infraction which could result in termination. This attitude was again apparent on 12–17–97 when I tried to present her with her policy handbook in front of other members and she refused. This attitude over this period is not only directed at management members but her peers, and it is having a profound impact on the overall well-being & harmony of the organization.
>
> This behavior of disrespect & insubordination must stop immediately or Jan will be subject to further discipline up to and including discharge.

Hatcher refused to sign the discipline and she did not write any comments in the section of the form provided for this. By letter dated January 22, 1998, the president of the Respondent, Shigehiko Ikenaga, advised Hatcher, who he described as a good employee with an outstanding attendance record, that the discipline was proper and would remain in her file. On cross-examination, Hatcher testified that Supervisor Sherry Nevins, a production supervisor who was hired by the Respondent in December 1997, commented about the speed and efficiency of her work. On redirect, Hatcher testified that she bid on a position in quality control and the job was given to someone who she believed was less qualified than her; that the employee who was given the job, unlike her, did not have a perfect attendance record, had less seniority, and was on medical leave so she could not fill the position right away; that she was upset that the other employee got the job and she told Gary Seivert in human resources and Ikenaga that she did not think that the other employee deserved the job; and that she was told that was their final decision and she had a bad attitude.

In June 1998, according to the testimony of Sherry Nevins, the Respondent launched the rail coil line. She testified that it was a very difficult launch, it was not very well planned and the Respondent was really struggling with the launch of that new product; that this resulted in a lot of overtime for the employees and the hiring of a lot of new employees; and that to increase production the Respondent commenced rotating breaks and lunches so that the machines would be running for all 8 hours of the shift.

In the summer of 1998, the Union commenced an organizing campaign of the Respondent's full-time and regular part-time production and maintenance employees at the Dundee facility. A number of the Respondent's employees signed an authorization petition, General Counsel's Exhibit 5, which states as follows:

> **We are the Union!**
> We believe that only through collective bargaining can we have a voice in our workplace; achieve fair treatment for all; and establish seniority, job security and better benefits, wages and working conditions. Therefore, this will authorize the United Automobile, Aerospace and Agricultural implement Workers of America, UAW to represent me in collective bargaining. This will also authorize the UAW to use my name for the purpose of organizing Diamond Electric.

Hatcher signed the union authorization petition on July 27, 1998, General Counsel's Exhibit 5(B). She testified that she read it before she signed it and that she delivered it to another employee.

On July 27, 1998, the Union held a meeting for Respondent's afternoon-shift employees at Laborer's Local 465 in Monroe, Michigan. Duane Balinski, who is an organizer with the UAW, testified that there was a sign-in sheet at the meeting, General Counsel's Exhibit 39, and he knew the nine employees on the list and they attended the meeting, Kenneth (Ike) Pope, Sherry Grodi, Matthew Heiden, Jean Dozier, Becky Nagy, Larissa Manwaring, Billy Robbins, Tim Tennyson, and Dennis May; that he saw these nine employees, who are the first nine employees who signed General Counsel's Exhibit 5(A) starting from the left column, sign the union authorizing petition on July 27, 1998; that the nine were sitting at a table; that while Tennyson and May wrote "2/27/98" with their signatures, he saw them both sign on July 27, 1998, and the Union did not have an organizing drive going on at February 27, 1998; and that he wrote Diamond Electric in the upper left-hand corner in the block on General Counsel's Exhibit 5 prior to the workers signing the petition. Balinski sponsored General Counsel's Exhibit 5(A), one page of the authorization petition, with respect to the nine signatures in the left and middle column. It is noted that there is no date in the block signed by Pope.

After she found out about the union organization drive on July 28, 1998, Shannon Ruetz, who was an employee of the Respondent from March 9, 1998, to March 9, 1999, began wearing union buttons, a union cap, and she carried a note pad and pencils with the union logo on them at work. Ruetz testified that she also helped with the union newsletter, distributed them, talked to coworkers on breaks and lunches, and obtained signatures on the union authorization petition.

On July 28, 1998, Sally Cook (Jernigan after September 24, 1998), an employee of the Respondent who helped the Union organize, signed the Union's authorization petition, General Counsel's Exhibit 5(C). She testified that she saw the following of the Respondent's employees on July 28, 1998, at the Laborer's union hall in Monroe, Michigan, signing the Union's authorizing petition, General Counsel's Exhibit 5(C): Ron Kazensky, John Kryston, Amy Neidinger, and Jolene Naugle.

Also on July 28, 1998, Respondent's employee Peggy Heiden, who was a volunteer organizer for the Union who wore union hats and buttons at work, signed the Union's authorization petition. General Counsel's Exhibit 5(B). Heiden testified that she read the petition before she signed it at the union hall;

and that she saw Janice Jackson, Dawn Winkleman, Julie Liedal, Elaine Bazzy, Peggy Bayer, Peggy Chlebos, Heidi Ost, and Coke Sherry Winkelman sign the authorization petition. General Counsel's Exhibit 5 (B) was received with respect to the printed matter on the page and the signatures of these employees.

On the morning of July 30, 1998, the Respondent had a meeting in the lunchroom with the first-shift production employees. The Respondent's president, Ikenaga, spoke to the assembled employees. There are differing accounts with respect to what Ikenaga said during this meeting. Employee Janice Hatcher, who was on the employees' volunteer organizing committee, wrote newsletters for the Union's newspaper, passed out flyers, wore union hats and buttons to work, and did home visits with a union organizer, testified that at this meeting Ikenaga said that he heard rumors of a union coming, and if the Union came, he would have to close the doors, he could not understand what was so terribly wrong with the Company. Hatcher testified that she then said, "poor management" and Manager Don Lynch replied that he did not think so. On cross-examination, Hatcher testified that toward the end of his speech Ikenaga said that his dad was sick with cancer and he was leaving for Japan because of the surgery that his dad, who was the CEO of the Respondent, was going to have; that Ikenaga said that the business was losing $4.5 million; that Ikenaga was emotional and he said he heard rumors of union talk and that if the Union came in he would have to close the doors; that in an affidavit she gave to the Board she indicated Ikenaga said that he was sorry that the Company would have to close its doors if the Union came in; and that during management's meeting with the employees in the cafeteria she asked Ikenaga to recognize the Union but no one replied. Peggy Heiden testified that she attended the July 30, 1998 employee meeting at 10:45 a.m.; that at this meeting Ikenaga started the meeting with the statement that he heard that there was a very strong union organizing meeting going on in the plant, he was saddened by that, he could not work with the union, and there would be no future for the plant with a union; and that Ikenaga also mentioned that his father was ill. On cross-examination, Peggy Heiden testified that during this employee meeting Ikenaga also said that the Company had a deficit of she believed $4.5 million. Supervisors Gary Silvert, Sherry Nevins, and Bob Williams were present. When asked by the Respondent's attorney what subjects he wanted to talk to the employees about on the morning of July 30, 1998, Ikenaga testified as follows:

> I learned that more Union [this was the second attempt to organize the involved employees] is trying to organize our Company. Then at that time we have a business discussion at that time so I wanted to share our kind of problem with our employees and try to share that information and try to resolve those problems together by teamwork.

Ikenaga also testified that he told the employees at this meeting that the Company had a loss of about $4.5 million, and that he had to go to Japan the next day because his father was going to have surgery for cancer. Ikenaga answered, "No" to the following questions of the Respondent's attorney: "did you say I will have to close the doors if the Union comes in," "[d]id you say you could not work with the Union," and "[d]id you say there will be no future with the plant with a Union." (Tr. 735, 736.) On cross-examination, Ikenaga testified that at the time a bank was threatening to pull the Company's loan and Daihmler-Chrysler was threatening to terminate their contract.

Nevins testified that she was present at the July 30, 1998 meeting in the cafeteria where Ikenaga spoke; that, with respect to what Ikenaga said,

> Well he was talking about we had lost four and a half million dollars and our production was not very good, we were having a lot of problems and complaints from our customers not being able to make shipments and about communication, we were having some communication issues between Management and the employees. And also about hearing rumors about a Union drive and that he apologized to everybody for working all the overtime and taking the people away from their families and he wanted communication to improve an wanted everybody to work together as a team.

Nevins testified that she did not recall Ikenaga saying anything about his father at this meeting; that Ikenaga did not say that he would have to close the doors if the Union came in or that he could not work with a union or that there will be no future for the plant with the Union.

Steve Hill, who was a manager with the Respondent at the time, testified with respect to the July 30, 1998 employee meeting that

> Shige had called the meeting, and when we got to the meeting he was there. It appeared that most of the people in the building that were in the production and the production management were called into that meeting. Shige said that there were rumors of some activities going on–organizing activities.
>
> He elaborated on a lot of things that were going on at Diamond at the time. He remarked that we were $4.5 million in the red. He told some information that I was aware of, because the Material Manager that we had had problems with the launch of the rail coil.
>
> . . . .
>
> He surprised us all, I was not aware of it and he told us about his father being ill and having to have some surgery.
>
> . . . .
>
> He really expressed the interest that he wanted to work together without an intermediary. He just wanted to work together. He felt that Diamond was a family and he just wanted to keep it that way.

Hill answered, "[n]o" to whether Ikenaga said that he would have to close the doors if the Union came in, that he could not work with the Union, or there would be no future for the plant with the Union.

During their lunchbreak on July 30, 1998, a group of employees, including Hatcher, Peggy Heiden, Sherry Winkelman, John Kryston, and Amy Neidinger, went to Ikenaga's office and gave him a petition signed by 22 employees, including Hatcher and Peggy Heiden. General Counsel's Exhibit 7. One

of the employees, Janice Jackson, read the petition to Ikenaga, who said nothing. The petition reads as follows:

GOOD NEWS!!

To our Friends and Co-Workers

This letter is to inform you that we are members of the UAW Volunteer Organizing Committee. We are going to be exercising our federally guaranteed rights as outlined by the National Labor Relations Act.

> Section 7 of the act states, in part . . . "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

We understand that it would be **illegal** for management to do any of the following:

- Threaten to close the plant because of union organization.
- Threaten employees with demotion, or loss of benefits because of union activities.
- Refusal to bargain in good faith with the employees' union on matters pertaining to wages, hours and conditions of employment.
- Say unionization will take away vacations or other benefits presently in effect.
- Threaten employees with economic reprisal for participating in union activities,
- for example, threatening to move your location, close the business, curtail
- operations or reduce your hours or benefits.
- Tell employees that overtime, premium pay, bonuses or other economic benefits will be discontinued if the company is unionized.

WE WILL EXERCISE OUR RIGHT TO GAIN RECOGNITION OF OUR UNION AND A SIGNED CONTRACT

Peggy Heiden testified that the march on management consisted of a number of day-shift employees, including herself, who were on the volunteer organizing committee (VOC) presenting a petition, General Counsel's Exhibit 7, to President Ikenaga, notifying him that the employees were trying to organize. On cross-examination, Ikenaga testified that he did not recognize General Counsel's Exhibit 7 but that some employees did come into his office after the July 30, 1998 meeting and they did give him a paper with signatures on it which he read and then turned over to human resources; and that he did not know what the paper was for.

On July 30, 1998, Shannon Ruetz signed the union authorization petition with the above-described language. General Counsel's Exhibit 5(C). She testified that she read the authorization petition before signing it. On cross-examination, Ruetz testified that she understood that by signing the authorization petition she was designating the Union as her union.

According to the testimony of Diana McKeever, she left the Respondent, on August 16, 1998, and about 3 weeks before that she signed a union authorization petition, General Counsel's Exhibit 5(A). McKeever testified that Dozier gave her the petition.

General Counsel's Exhibits 15 through 36 are exemplars for 22 of the Respondent's employees who allegedly signed the union authorization petition, namely David Courter, Kevin Carl Crego, Tina Marie Domansky, Jean A. Dozier, Jill R. Edson, Charles R. Fetterman, Sherry Grodi (she signed the union authorization petition on July 27 and 30, 1998), Bryan S. Kilburn, Dennis R. May Jr., Larissa D. Manwaring, Diana L. McKeever, Becky J. Nagy, Chad Naugle, Janelle T. Ost, Yaseni C. Pilbeam, Billy Joe Robbins, Douglas B. Russ, Brian Schwartz, Barbara L. Shier, Lois Shroyer, Todd A. Stoner, and TimTennyson. As noted below, Kilburn, who signed the petition on July 30, 1998, became a supervisor on September 8, 1998. As indicated by the General Counsel, General Counsel's Exhibits 5(A), (B), (C), (D), and (E), to the extent they were not already received, were offered to compare the signatures thereon with the signatures in the aforementioned exemplars of 14 employees, namely Bryan Kilburn, Janelle Ost, Yaseni Pilbeam, Tina Domansky, David Courter, Lois Shroyer, Brian Schwartz, Jill Edson, Charles Fetterman, Kevin Crego, Chad Naugle, Bargara Shier, Todd Stoner, and Douglas Russ, and they were received with that understanding.

On August 1, 1998, according to the testimony of Peggy Heiden, Nevins approached her at her work station in the assembly department, with Peggy Chlebos present. Peggy Heiden testified that Nevins inquired as to whether she could ask her some questions; that Nevins asked her why she was trying to bring the Union into the plant; that Nevins said that Heiden would be the first one to "bitch" when the plant closed down; that Nevins said that she had worked with another union in a previous job and that the Japanese would not work with the union at Diamond Electric; that there was no future for the plant with Diamond; that later that day she was present when Nevins asked Matt Heiden why he was wearing a prounion button; that when Matt Heiden responded that he wanted the union Nevins asked him what he was going to do without a job if the plant closes, the Company could lose the Chrysler business; and that Nevins said that the Japanese would not allow the Union. On cross-examination, Peggy Heiden testified that before the Union drive Nevins had been very nice to her and had confided in her, they had a good relationship at work, and they joked around on the line.

Nevins testified that there were a lot of rumors going around on the floor about the plant closing but she would never discuss that; that when plant closing, what the Japanese would or would not do, and what the future would or would not be came up she would say, "[N]o that is not true"; and that as indicated in Respondent's Exhibit 13, which is a company handout dated August 10, 1998, the answer to question 7 therein, namely "**Will Diamond Electric close the plant because the UAW wins the election?**" is "ABSOLUTELY NOT"; that she did not tell Peggy Heiden that she would be the first to bitch when the plant closes or that the Japanese would not work with a union or there would be no future for the plant with the Union; and

that she did not recall having a conversation with Peggy and Matthew Heiden where she said to them "what would you do without a job if you lose Chrysler and the plant closes," and she did not say this or that the Japanese would not allow a Union.

On August 3, 1998, the Union filed a petition for certification of representative in Case 7–RC–21388. General Counsel's Exhibit 2(A). On August 14, 1998, the parties entered into a Stipulated Election Agreement. General Counsel's Exhibit 2(B).

The first week in August 1998 Ruetz had her break and lunchtimes changed by her supervisor, Joe Bitz. Formerly she took her breaks and lunch with other employees but after the change she took her breaks alone. Ruetz helped with the union newsletter, distributed it, talked with coworkers on break and lunches about the Union, obtained signatures on the union authorization petition, and wore union buttons, union caps, and carried notepads and pencils with the union logo on them. The change lasted for about 3 to 4 weeks. On cross-examination, Ruetz testified that the change in her breaktime occurred when the Respondent began running the machine in her department through breaks; that when a machine is running someone has to be there; and that she covered other employees' breaks by taking her breaks early.

Hill testified that after June 1998 the Respondent tried to keep the machines running all 8 hours of the shift and so the employees breaktimes were staggered so that the machine doing the rail coils could run continuously during the shift; and that everybody in the department would have gone on some type of alternating beak so that the Respondent could keep the machine running.

On August 8, 1998, Peggy Heiden and Nevins had another conversation. Peggy Heiden testified that she was at her work station in assembly and Nevins initiated the conversation; that Nevins told her that her feelings were hurt by the newsletter the employees who were the organizers for the Union published and that if the employees wanted a fight, "then you've got it." On cross-examination, Peggy Heiden testified that Nevins took the newsletter personally and it hurt her feelings that it said lies, cries, and alibis; and that this conversation did not refer to a specific reference to Nevins in the newsletter.

Nevins testified that she did not tell Heiden "if it is a fight you want, you have got it."

A day or two later, according to the testimony of Peggy Heiden, she had another conversation with Nevins. That morning Nevins approached her line with a company newsletter against union organizing. Nevins told her to take a few minutes and read the letter. About 15 minutes later, Nevins returned and asked her if she could talk to her. Peggy Heiden testified that she was led into the lunchroom, they sat down and Nevins asked her to discuss the company newsletter; that she told Nevins that she did not want to talk about the Union; that Nevins then said that she thought that they needed to discuss it, and she told Nevins that she did not want to discuss the Union; that she got up and was going to leave when Nevins said, "You will sit down and we will discuss this or I write you up for insubordination" (Tr. 357); that she sat down and Nevins was trying to ask her more questions about the newsletter; that she then told Nevins that she did not have to talk about it because it was about the Union; that Gary Seivert, who was with human resources, walked into the room and asked what was going on; that she told Seivert that Nevins was trying to talk to her about the Union and she asked Seivert if she had to do this; that Seivert did not reply and she left the lunchroom; and that as she was leaving the cafeteria she saw Executive Vice President Dave Bagnel standing there.

Nevins testified that in one of her conversations with Peggy Heiden about one of the Union's newsletter, which conversation took place in the lunchroom, Heiden said that she did not want to discuss it and they did not discuss it anymore; that she did not tell Heiden that she had to stay and talk with her; that she did not suggest to Heiden that it would be insubordinate for her to leave; that she did not recall Gary Seivert coming by and Peggy Heiden just said she did not want to discuss it, she wanted to go back out to the line and she went back to the line; and that she did tell Heiden that she felt bad that the Union would take away her, Nevins', right to represent employees and if there was a third party, the employees would go through the third party and the communication between the employees and her would be "broke down." On cross-examination, Nevins testified that she asked Heiden to come to the lunchroom with her; that she asked Heiden to sit down; that she asked Heiden to read the company newsletter which indicated that the Union was not necessary; that she asked Heiden what was the most important question in the Company's newsletter for her; that Heiden then said that she did not want to talk about the Union and she was told not to; that she then asked Heiden, "Are you sure we can't just talk about one of the issues on here?" (Tr. 971); that she had been instructed that she was not supposed to ask employees about their union activity or about why they support the Union, and she knew this when she took Heiden to the lunchroom; that she understood that it was Heiden's legal right not to talk about her support of the Union; and that Heiden was not calm, she was nervous. Nevins further testified that she passed out the company newsletter to all of her employees; that she did not take the employees to the lunchroom after her discussion with Peggy Heiden but she asked the employees what was the most important question on the newsletter for them; and that this was part of the Company's campaign, and she was doing her job.

Later that same day, Peggy Heiden had another conversation with Nevins. Peggy Heiden testified that it was about 3:15 p.m. and she had closed down her line for the day; that she walked to the testing department to speak with coworker Karen Coffey and Nevins asked her what she was doing there; that she told Nevins that she was talking to Coffey about signing the union authorizing petition; that Nevins said that she should go back to her own department and she was not supposed to leave her department; that Nevins then said that they were told to watch the organizers and they were not supposed to leave their department, they were not supposed to be congregating; that her shift was just finishing and Coffey was just coming on to her shift in the testing department; that before this she had not been advised that she could not leave her department; that employees Lorri Iott and Ron Bauer, both of whom wore "Vote No" buttons, left their production areas; and that when she worked with Iott she recorded that Iott left the line 16 times in 1 day. On

cross-examination, Peggy Heiden testified that while Coffey was not working, they were both on the clock.

Nevins testified that she saw Peggy Heiden, who works in assembly in the front of the building, talking with Coffey in the testing department, which is in the back of the building; that when she asked Heiden what was going on Heiden said that she was trying to have Coffey sign a union card; that she told Heiden that she needed to go back to her own department and Coffey needed to get on with her business; and that she would not have said that she was supposed to watch union organizers.

Lefief testified that Heiden told him that she felt that she was being picked on with respect to being away from her work area.

Nevins testified that several times she told Steve Burnett that Peggy Heiden was leaving her machine without permission and Burnett talked to Heiden. There is nothing in Heiden's personnel file memorializing such talks. Nevins further testified that she never recommended that Heiden be written up for walking away from her machine without permission; that she complained to Burnett about Peggy Heiden's production but she did not make any suggestion as to what disciplinary steps should be taken against her; and that she asked management to counsel Peggy Heiden about production because no matter what she said to Heiden it was not working.

General Counsel's Exhibit 37 is a stipulated list of the 71 employees who were in the proposed bargaining unit for the weekly payroll period ending August 14, 1998. The General Counsel and the Respondent stipulated that the unit described in paragraph 7 of the complaint is an appropriate unit within Section 9(a) of the Act. Respondent's Exhibit 6, which is the *Excelsior* list or voter eligibility list, was by stipulation created as of August 8, 1998, and submitted to the Board on August 21, 1998. Respondent's Exhibit 7 was described by the Respondent's attorney as a supplemental sheet showing employee movement in and out of the unit. Respondent's Exhibit 7 lists 31 employees and is titled "Employed in period of 7/1/98–9/30/98 but not on voter eligibility list dated 8/8/98 and submitted to NLRB on 8/21/98." The Respondent stipulated (Tr. 1074) that the unit that was described in the Stipulated Election Agreement and in the complaint is an appropriate unit; that those employees named on General Counsel's Exhibit 37 are members of the unit as of August 14, 1998, and those on this list who signed the cards (also described as the authorization petition) included in General Counsel's Exhibit 5 were in the unit both when they signed the cards and on the August 14, 1998 payroll measurement date.

On August 20, 1998, Tim Carter, who worked for the Respondent from April to October 1998, signed the above-described authorization petition. General Counsel's Exhibit 5(F). When asked if he read the words on the petition when he signed it, Carter testified (Tr. 40), "I signed it, but I was speaking with a union organizer at the time and I understood what was going on and what the about the volunteer organizing committee." After signing the sheet, he told the new quality control manager, Jerry Folmer, that he fully intended to support the organizing by the Union at Diamond Electric and he began to wear his union pin.

Carter testified that in late August 1998 his immediate supervisor, Mardi Reid, asked him to step outside the break area to a picnic table outside the cafeteria to have a conversation. According to Carter's testimony (Tr. 44), he and Reid said the following:

> A She had indicated to me that she wanted to give me, basically a verbal warning. It had come to her attention that there . . . [were] four areas, I believe, that she talked about, wandering the floors, talking to people I wouldn't normally be talking to, irritability at meetings, taking excessive breaks, smoke breaks. We discussed this.
>
> . . . .
>
> A I had asked her if this had anything to do with the union organizing activity. And she had indicated it didn't. And I had responded I thought it was kind of funny a couple days after I declare my support for the union that I would be getting a verbal reprimand when nothing else. . . you know, she had never said anything before that.

According to Carter, before this nothing had been said to him about wandering the floor or talking to people that he normally did not talk to. On cross-examination, Carter testified that Reid's verbal warning was not documented and that during that period he may have went over the allotted time for a break once or twice or taken an extra one.

Reid testified that Carter extended his breaks quite often and he was not always at his workstation when required; that she spoke to Carter about this three times but she did not discipline him; that after the union organizing effort was well known, Carter asked to talk with her several times over a week to 10 days and when she finally had time she sat down and talked with him at the picnic table outside the building; that this conversation occurred after a break when Carter told her that he still needed to talk to her and she told him that she was free; that Carter told her that he believed that since he started wearing a union button he was being watched by upper management, Vice President Dave Bagnell specifically, and he wanted to tell her where he stood with the Union and why he felt that he wanted the Union; that before this she had seen him wearing a union button; that Carter told her he believed that his job was in jeopardy because he had started wearing a union button; that she told him that if he was doing his job and was at his work station, he had nothing to worry about; that she told him to watch his breaks and make sure that he was at his workstation; that this was not discipline and she was not warning him; and that this was the same friendly conversation they previously had. On cross-examination, Reid testified that she did not write up Carter for wandering away from his station and she did not make a notation in his personnel file; that she talked to Carter two times before the final time; that the first time was probably in May 1998 and the second time was probably late June or July 1998; that Carter was taking five or six breaks a day because he had an excessive smoking habit; and that she did not think that his conduct warranted any discipline.

On September 2, 1998, Shannon Ruetz saw Tabbitha McDonald sign the union authorization petition. General Counsel's Exhibit 5(G). Sally Cook was present. The language on the authorization petition is different from that quoted above in that on this sheet it reads as follows:

We are the Union!

We the undersigned employees of Diamond Electric authorize the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, to represent us in collective bargaining. We also authorize the UAW to use our names and this prtition to show our support for the union.

Sally Jernigan (Cook) testified that she saw the Respondent's employee Tabbitha McDonald sign the Union's authorization petition, General Counsel's 5(G) which is dated "9–2–98," and that they were in the smoking breakroom on break on September 2, 1998, she had previously talked to McDonald about signing the petition, McDonald said that she wanted to, so she got the petition, and she slid it over to McDonald, who signed it and slid it back. On cross-examination, Jernigan testified that Shannon Reutz may have been present when McDonald signed the petition.

In the first week in September, Peggy Heiden was talking with temporary Lori Sidebottom about her cats while they were working. Peggy Heiden testified that the conversation did not stop production and the line continued to run; that the Company did not have a rule which prohibited employees from talking to others while they were working; that Nevins took Sidebottom and another temporary employee off her line and brought a replacement worker to her line and told her that she had to talk with her; that they went to human resources, to the office of Gary Sievert; that Nevins, in the presence of Sievert, asked her if she was trying to organize the temporary employees and told her that she was not supposed to talk about the Union during working hours; that she told Sievert that the harassment had to stop, Nevins had been following her into the ladies room, timing her breaks, timing her lunch hours, and she could not talk to anyone and nobody could talk to her; and that Nevins denied harassing her and said that bringing in the Union was taking away Nevins rights as a supervisor. On cross-examination, Peggy Heiden testified that in that time period her line did have periodic stoppages when they were out of parts, it could be a machine breakdown, to make an adjustment, or someone could have left the line; that Nevins asked her if she was trying to organize the "temps"; and that during this conversation Nevins did not accuse her of stopping the line.

On September 8, 1998, Peggy Heiden was given the following writeup, General Counsel's Exhibit 13:

> I had a conversation with Peggy Heiden about the work stoppage that occurred on 9–4–98 at 1:15 pm. I explained to Peggy about the importance of keeping the line running and being a mentor to our new team members as well as our temporary operators.
>
> Given to team member on 1:50 pm 9/8/98.
>
> Team member did not sign.

The writeup is signed by Nevins who told Peggy Heiden that it would go into her file. The document notes "**PLACE A COPY OF THIS IN EMPLOYEES FILE.**" Peggy Heiden testified that there was no work stoppage or any kind of a work slowdown, and that she told Nevins the line did not stop and she would not sign the document. Also Peggy Heiden testified that she never deliberately did anything to cause a stoppage and other than General Counsel's Exhibit 13, she had never been accused of causing deliberate stoppages on the line.

Nevins testified that she did not follow Peggy Heiden around; that she was too busy to follow anybody around; that on September 4, 1998, they had an additional person, who was a temporary, in the assembly area to increase production; that Heiden was doing the core operation, which is the first part of the operation, and when Heiden started to talk to Sidebottom the temporary employee did not have any coils to work with; that the line stopped for a couple of minutes; that she went over to the line and told Heiden and Sidebottom to get back to work; that employees can talk on the line as long as the line keeps moving; that she asked Heiden to come to the human resources department; that Seivert, who was the human resources manager, was present while she spoke with Heiden; that she talked with Heiden about the importance of keeping the line running and, as the most senior employee there, to mentor new employees and keep them working; that when Heiden said this all has to do with the Union she told Heiden that it had nothing to do with the Union; that they told Heiden that it was not a discipline; that she did not recall any discussion during the meeting about Heiden trying to organize the temps or talking to the temps or other employees about the Union or that she should not talk with them about the Union; that she did not tell Heiden that she was taking away her rights as a supervisor; that at this meeting she denied Heiden's allegations that she was following her, harassing her, and constantly on her case; and that Heiden refused to sign the writeup saying that she did not stop the line.

On September 10, 1998, Nevins came up to Hatcher on the assembly line and told her that Don Lynch wanted to speak to her. The conversation took place in what was then Dave Vagman's office. Hatcher testified that Lyons told her that he called her in there because he felt that she was headed down the wrong path; that she asked him what he meant by that; that Lyons told her that some of her peers had come to him with concerns about her production; that when she asked for specifics Lyons would not say; that Lyons told her that he decided to put her back in Testing that day; that she asked why and when he did not give a reason she told him that she wanted to take it to the committee to find out why she was being moved; and that Lyons never did tell her what the so called complaints about her production were about and he gave her no specifics. Hatcher had worked in Testing from July 1995 to January 1998. She bid out to Assembly in early 1998, worked in Winding, and then returned to Assembly. On cross-examination, Hatcher testified that at one point in September 1998 she attended a safety meeting and Supervisor Steve Burnett started to talk to her in the presence of another employee about claims of low production which were being made against her; and that she took out a notebook and started writing, and Burnett, who had said that her production was low, said that he was not going to meet with her if she was going to take notes.

On the morning of September 11, 1998, Hatcher spoke with Lynch in the human resources department. Hatcher testified that she asked Lynch what she had done wrong and Lynch told her "leave the line"; that when she told him she was not a wanderer, and he let Ron Bauer and Laura Iott use the telephone, give keys to their children, and go out and start their cars in the

winter time before the shift ends, Lyons told her not to go there; and that Bauer and Iott wore "vote no" buttons. That afternoon Lyons approached Hatcher in the testing area and, according to Hatcher's testimony, told her "that the Company had decided not to further indict me because there wasn't enough evidence or documentation for my production" and that "he was putting me back in the testing area to keep me out of harms way." (Tr. 266.)

Nevins testified that in September 1998 Hatcher was moved to the rail coil assembly line to work with Laura Iott and Bauer who had been previously trained on that line; that prior to Hatcher's transfer the line struggled but it met production; that after Hatcher's transfer to the line it was not meeting the production goals; and that Bauer and Laura Iott complained about Hatcher's production and Lynch got involved in the decision that Hatcher be moved back to the testing department where the Respondent needed help.

In mid-September 1998, Jerry Folmer told Timothy Carter that he had to show him a movie about unions. Carter testified that he told Folmer that he did not need to see it because his mind was made up in that he had worked in a UAW shop for 20 years and he supported the Union; that he and Folmer had a long discussion about the Union that night at work and Folmer asked him if he was a union organizer; that Folmer told him that night at work that he had heard that he was put in the plant to organize Diamond Electric; that Folmer then asked him if he had been "salted" there; and that when the movie showed an international union taking over the bargaining and not giving the local any say in it, Folmer asked him if that was how it happens, and he told Folmer that he was not an organizer, he had never been in that situation, and he would not know.

On September 18, 1998, Hatcher had a conversation with Shige Ikenaga about her September 10, 1998 transfer to testing. Hatcher testified that the conversation occured in Ikenaga's office; that just she and Ikenaga were present; that she told Ikenaga that she was concerned about why she was moved to testing and she asked him if he knew why she was moved; and that Ikenaga said that he knew why she was moved but he had to be very careful of what he could say and that he could not tell her. Ikenaga testified that Hatcher asked for this meeting; and that when she asked him why she had been transferred he told her that he knew the reason but he could not tell her at the time; that she was transferred because employees Laura Iott and Bauer complained that "[s]he is slow or quality problem and sometimes she go out, often she go out from the working place" (Tr. 737); that Hatcher was transferred to avoid a conflict between employees; and that he did not want to tell Hatcher who complained because he did not want additional conflict; and that he did not remember Hatcher saying that she did not want to be transferred. On cross-examination, Ikenaga testified that the proper thing to do under company procedure would have been to bring any problems Hatcher may have had to her attention so she would be able to improve her performance; that he knew at the time of the transfer that the employees were attempting to organize and he knew that Hatcher was one of the union supporters; that he did not know if Bauer and Laura Iott were union supporters; and that he never gave Hatcher a chance to tell her side of the story as to who was causing the slow production (assuming that the production was slow).

As shown by the involved tally of ballots, General Counsel's Exhibit 2(D), the election was held on September 24, 1998, and of 65 eligible voters, 27 voted for the union petitioner, 32 voted against the Union, and there were 5 challenged ballots. The Union filed objections, a charge and an amended charge.

Ruetz testified that when she went to vote in the Board election on September 24, 1998, at 7:30 a.m. she saw Supervisors Gary Seivert and Steve Hill standing at a table in the break area 20 to 30 feet from her when she picked up her ballot in the polling booth area. See Respondent's Exhibit 2. On cross-examination, Ruetz testified that she went into the breakroom three times during her shift on September 24, 1998, she went into the breakroom after her shift at 7:30 a.m. to vote, and she went into the breakroom for the vote count at 4 p.m. that day; that when she left the breakroom after voting Seivert and Hill were not still there; that she saw Seivert and Hill in the breakroom only for the few seconds that it took her to walk past them when she entered the breakroom; that when she saw Seivert and Hill in the breakroom on September 24, 1998, at 7:30 a.m. union observer Iva Pilbeam, employee Janet Hatcher, and the Board agent were in the breakroom; and that she also went into the breakroom when she came for the beginning of her 11 p.m. shift on September 24, 1998. Sally Jernigan testified that she got off her night shift late on the day of the vote on September 24, 1998, so she did not vote until between 7:35 or 7:45 a.m., and she did not see Reutz voting; that in her affidavit to the Board she indicated that she arrived to vote between 7:30 and 7:35 a.m.; and that she was the only one in the polling area when she voted.

Hill, who no longer worked for the Respondent when he testified at the hearing herein and who was the material manager when he worked for the Respondent, testified that he was at the involved facility on the day of the election, September 24, 1998; that he held a shift meeting from 7 to 7:15 a.m. and Seivert was present; that the standup meeting was held by the double doors leading from the production area to the front office; that he did not go into the voting area between 7 and 8 a.m. or 3 and 4 p.m. because he was instructed not to be in the voting place during these times; and that he and Seivert absolutely did not go into the lunchroom or the cafeteria during the two polling periods. On cross-examination, Hill testified that he did go into the cafeteria before 7 a.m. on September 24, 1998, to get something to drink.

Hatcher testified that she was moved back from the testing area to assembly "right after the election." Nevins testified that when the testing department became pretty much established Hatcher was transferred back to assembly.

Nevins testified that shortly after the election Tammy Clark told her that Heiden, Hatcher, Ruetz, and Cook wanted to get Nevins fired; and that Ron Bauer told her that Heiden wanted to get her fired.

Clark, who is a testing line leader, testified that sometime in August or September 1998 she and Peggy Heiden were alone in the warehouse repackaging parts and Heiden

> was mad at Sherry and she persisted to complain about how we needed to get rid of her, that we used to be friends, which was never true, and that she said that ever since the Union came in, that she has been on her and riding her, and that she was a "f–king bitch" and that we needed to get rid of her. [Tr. 1062.]

Clark further testified that she told Heiden that she did not recall her ever having a friendship with Nevins and then she told Nevins and Burnett what Heiden had said. On cross-examination Clark testified that ever since Nevins came to the Respondent Peggy Heiden hated her; that she was not a Union supporter; and that she did not have any reason to stop in to talk to Gene Bialy in March 1999. On redirect Clark testified that she did not remember signing a statement that was given to Bialy; that it was her signature which was dated March 20, 1999 on a document which counsel for the Respondent showed her; and that she did not recall talking with Bialy about Nevin's working relationship with Peggy Heiden in March 1999. Subsequently Clark testified that between January or February 1998, before the Union activity commenced and shortly after Nevins was hired, Peggy Heiden told her "that she couldn't stand Sherry [Nevins], and she wanted her out, no matter whatever it took to get rid of her." (Tr. 1071.) On recross, Clark testified that a number of people complained about Nevins "[o]nly because they heard a couple other people complain about her, [four or five] so they went along with them" (Tr. 1073); and that she did not recall whether she told Nevins about Peggy Heiden's January or February 1998 comment.

Toward the end of September 1998 Hatcher examined her personnel record. She testified that there was nothing in her personnel record with respect to complaints about her production. On redirect, Hatcher testified that the only people that she worked with on the production line were Peggy Heiden and Peggy Chlebos; and that before the union campaign she was never told that she was going to be disciplined for production.

Nevins testified that she reported to higher management about Hatcher's production; that she realized how important it is to document discipline; that while General Counsel's Exhibit 8, which is the November 5, 1998 Herrmann memorandum covering his meeting with Hatcher about wearng a hairnet, is the only written discipline in Hatcher's file, she counseled Hatcher "many times"; that she was aware that under the Company's disciplinary procedure, there is a step for an oral warning and a form that is supposed to be filled out for an oral warning; and that the form is supposed to be placed in the personnel file. As noted above, no such forms were found in Hatcher's personnel file. Nevins testified that she recommended to higher management that Hatcher be disciplined and no action was taken. She also testified that the Company keeps production records and there is a way of verifying whether somebody meets their production goals; that she complained to higher management three or four times about Hatcher not making her production and Hatcher would be counseled; and that she was not sure if there was a record of this in Hatcher's personnel file (there was not). On cross-examination, Nevins testified that at the beginning Hatcher worked with Peggy Heiden, Peggy Chlebos, and a temp and there were no complaints about Heiden's production; that subsequently in August or September 1998 Laura Iott and Ron Bauer complained about Peggy Heiden not carrying her load; that Peggy Heiden also complained about Hatcher not pulling her weight; and that Laura Iott and Ron Bauer were opposed to the Union. On redirect, Nevins testified that production records would show production for a date or a shift or a line or a product; that they were not kept by individual employee in assembly; that in testing, records were kept so that the daily production of an individual employee could be determined; and that such records are kept for 7 years for QS-9000.

Hill testified that it was not possible to reconstruct individual production data in the testing department.

At the hearing herein, the General Counsel's motion to amend paragraph 14(a) of the complaint was granted so that it now reads that Respondent by its agent, Tanya Brodie, at its Dundee facility on September 28, 1998, *and in mid- to late October 1998* coercively interrogated an employee as to his/her support for and sympathies on behalf of the Charging Party. The Respondent stipulated that to the extent that Brodie was involved in an employment interview around that time, she was an agent and a supervisor of the Company. This stipulation is noted in General Counsel's Exhibit 38, which also notes when 12 named individuals acted in a supervisory capacity on behalf of the Company, and notes that employee Bryan Kilburn, who was hired June 8, 1998, was promoted to a supervisory position on September 8, 1998, which he continued to hold as of the date of the letter, December 1, 1999.

Denise Thorp, who was an employee of the Respondent when she testified herein, testified that she was hired in the middle to the end of October 1998; that she had two interviewers, namely Brodie and Burnett; that during an interview Brodie asked her what her views are on the Union and she told Brodie that she did not have any views; and that she was told that she was hired and she should report to Bryan Kilburn the following Monday. On cross-examination, Thorp testified that after her interview she had to fill out a questionnaire; and that Brodie asked her what her views were on a union. Thorp was able to give many details on cross-examination with respect to what else was said during the interview.

Ryan Clark testified that when he interviewed with Brodie in November 1998 she did not ask him any questions about unions. Clark, who at the time was still a full-time student at a community college, told Brodie that he could not start until January 1999.

On November 5, 1998, Hatcher had a conversation with Supervisor Nevins about the Company's hair net policy. Hatcher testified that she was working in assembly at the time; that she was wearing her hair net but her hair from her earlobes to her shoulder was out of the net; that Nevins told her that she had to put all of her hair under the net; that she told Nevins that if she had to do it why didn't everyone else have to do it; that Nevins told her that if she had a problem with that she should go see human resources; that she and Nevins spoke with Will Herrmann in human resources; that she told Herrmann that other named employees wore some of their hair outside the net or a hat; that Herrmann told her that she had to follow a reasonable order of her supervisor; that she then stood up, said thank

you, and said that she "had to take it to a higher source" (Tr. 272); that she went to the restroom and tucked all of her hair up underneath the hair net; that Nevins walked into the restroom, said, "Jan this isn't a beauty contest" and told Hatcher Herrmann wanted to see her in the human resources office; that Herrmann told her that he felt what she said was a public outburst and she was being very sarcastic, and she told Herrmann that she was sorry that he felt that way, that she did not mean for it to be sarcastic and she did not mean for it to be a public outburst; and that in her view she did not have a public outburst and she had not been sarcastic. On cross-examination, Hatcher testified that Peggy Heiden, who was a very visible prounion employee, had her pony tail and her bangs hanging out of her baseball cap; and that she was not in the hallway when she said, "[T]hank you, I will take this to a higher source."

The Respondent stipulated that Herrmann was a supervisor from October 1998 through early November 1998, including the time of the November 5, 1998 warning to Hatcher.

On November 9, 1998, Hatcher received the following memorandum, General Counsel's Exhibit 8, from Herrmann:

> This letter confirms our conversation on Thursday, November 5, 1998, wherein we discussed your obligation to follow the reasonable direction of your supervisor and that public outbursts, such as you displayed, are inappropriate and unacceptable in the workplace.
>
> Please be advised that the company views both of these behaviors as serious situations. Repetition of these acts, or any other acts which are inappropriate in the workplace are considered to be grounds for the issuance of corrective discipline, up to and including discharge.

Peggy Heiden testified that in the fall of 1998 the Company put into effect a policy requiring that operators on a machine on the production floor had to wear a hair net; that later these employees were allowed to wear hats; and that she saw Laura Iott, who worked in assembly, not wearing a hair net and Nevins was present when this happened. On cross-examination, Peggy Heiden testified that she wore her hair in a pony tail outside the hairnet and Nevins never made an issue out of that; and that it was her understanding that as long as the employee's hair was in a pony tail behind the hairnet it was acceptable.

Lefief testified that Heiden complained to him that she was the only one that had to wear hair nets, saying that "nobody else had to wear hair nets."

Reid testified that the hairnet policy was put into effect in the production area to keep hair out of the product; that if hair gets into the product, it can create a short; and that the rule was followed by most employees.

Nevins testified that Hatcher and Heiden did not want to have their hair up in hair nets or ball caps; that all employees in the production area had to comply with the rule; and that they would tell her when they did not believe that she was enforcing this policy consistently. With respect to what occurred on November 5, 1998, with Hatcher, Nevins testified that she told her that she had to have the sides of her hair up; that Hatcher told her she did not believe that that was fair because other people were wearing baseball caps and their hair would hang out in the back; that she told Hatcher that if she had a problem with that they could go to human resources; that they spoke with Herrmann; that Hatcher started yelling very loud about not being fair, harassment against her, and other people were wearing their hairnets like that; that Herrmann told Hatcher that she needed to calm down and follow the directions of her supervisor; that they asked Hatcher to go to the restroom and take care of her hair; that as Hatcher went from Herrmann's office into the hallway and into the restroom she was yelling that this was not fair and they were just harassing her; that the area is a high traffic area; that at Herrmann's behest she got Hatcher back into his office; that she did not say anything to Hatcher about a beauty contest; that Hermann told Hatcher that that kind of an outburst was uncalled for, it was disruptive to the other employees, and it could not be tolerated in the workplace; and that she did not play a role in the preparation of General Counsel's Exhibit 8.

On November 30, 1998, Region 7 of the Board issued a complaint, report on objections, order consolidating complaint, objections and amended objections, and notice of consolidated hearing in Cases 7–CA–41236 and 7–RC–21388.[2]

In mid-December 1998, Day-Shift Supervisor Nevins had a conversation with employee Robert Bomia about 6:45 a.m. in the assembly area of the plant. Bomia testified (Tr. 134 and 135) that Nevins

> said that she heard through the grapevine that somebody said that if we got a Union that we would top out at $15.00 an hour, and she said that would be good, that would be grand, but then they would have to raise the prices on our ignition coils to pay everybody that kind of money. And if they raised

[2] GC Exh. 1(e). The complaint alleges that the Respondent (A) violated Sec. 8(a)(1) of the Act by (1) indicating to employees that it would be futile to elect the Union as their representative by telling them that it would not continue to operate the Dendee facility if they chose to be represented by the Union, (2) coercively interrogating employees on more than one occasion about their activities on behalf of and in support of the Union, (3) threatening employees with loss of employment and unspecified reprisals if they chose to be represented by a labor organization, (4) creating the impression among its employees that their activities on behalf of and in support of the Union were under surveillance by telling the employees that it was watching them, by escorting employees while walking through its facility, by telling employees that they were wandering in the plant, talking to unauthorized persons and overstaying their breaks, and by telling employees that it had heard from a supervisor that they were "salts," (5) orally promulgating new work rules which prohibiting employees from congregating and leaving their assigned departments, and which prohibited employees from talking to one another about the Union during working hours, (6) questioning employees' loyalty to it because they engaged in activities on behalf of and in support of the Union, (7) engaging in surveillance or employees' activities on behalf of and in support of the Union, (8) harassing its employees by telling them that their coworkers had raised concerns about their work performance, then later telling them that it would not charge them with these offenses because of lack of documentation, and (9) maintaining an overly broad no-solicitation rule at its Dundee facility, and (B) violated Sec. 8(a)(1) and (3) of the Act by (1) changing the breaktimes of employee Shannon Reutz, (2) counseling employee Peggy Heiden pursuant to an overly broad rule prohibiting employees from talking to one another about the Union during working hours and memorializing this counseling in writing, and (3) transferring employee Janice Hatcher to a new department.

the prices on ignition coils then Chrysler would go to a different Company. She didn't specify names, she just said company.

Nevins testified that during shift changeover Bomia came up to her desk and told her that he heard that if the UAW came in, he would get $15 an hour pay; that Bomia asked her if it was true and he said that he had been told this by UAW members; and that she told Bomia that if the Company paid $15 an hour, the price of the ignition coil would have to be raised, and then that could cause some of our customers to look for a cheaper ignition coil.

In mid-December 1998, Hatcher was assigned cleanup work. She testified that the machines went down and Nevins ordered her, Peggy Heiden, and Peggy Chlebos to do extensive cleaning; that they pulled up floor mats, were down on their hands and knees to pick up bolts, and they vacuumed and swept the floors; and that Bauer and Laura Iott were standing out by the timeclock; that she had cleaned up in the past but not as extensively; and that this happened another time in December 1998. Peggy Heiden testified that in December 1998 before Christmas Peggy Chlebos, Hatcher, Bauer, Laura Iott, and herself were working in the assembly department; that Nevins assigned her, Hatcher and Chlebos to pick up the mats off the floor, sweep underneath the mats, sweep under the machine, and sweep the machines; that they had to get down on their hands and knees and pick up parts under the machines; that Bauer and Iott did not do that type of work at that time but rather they were standing by the timeclock; and that she had never done cleanup work to that extent before in that she had never before got down on her hands and knees to pick up things off the floor or pick up big, heavy, rubber mats off the floor. On cross-examination, Peggy Heiden testified that Bauer and Iott were working on her line on this occasion and they were not told to clean up; that Bauer and Iott just left and she was not sure if they went to another department; that she saw Bauer and Iott standing by the timeclock when she was cleaning; that it was the end of the shift when she saw Bauer and Iott by the timeclock; and that Bauer and Iott were gone from her area for about 2 hours.

Lefief testified that it would be a part of a production employee's routine to lift the cushioning mats and clean under them, and clean in, around and underneath all of the machinery; that he did not consider this to be inappropriate or onerous work for a production employee; that a major or special clean occurred on average once a month and there were two in December 1998; that Heiden complained to him that she had been picked on to do cleaning; and that Hatcher complained about the cleaning responsibilities of her job.

Nevins testified that whenever the lines were down or visitors from Chrysler or the CEO was coming they did extra cleanup which involved cleaning under the rubber mats and machines; that she did not single out Hatcher and Peggy Heiden out for this duty; that everyone had to clean; and that Hatcher and Peggy Heiden did not accuse her of singling them out for this duty.

Hatcher also testified that in mid-December 1998 the employees asked Nevins and Steve Burnett if there was weekend overtime and they were told that there was not; and that sometime later they were told by a temporary employee, Jason Malinkowski, that he worked in the testing department the involved weekend with some other people. Peggy Heiden testified that overtime is assigned on the basis of seniority; that she has the third highest seniority in production; that she felt that she was denied overtime in mid-December 1998 when she was told by Nevins that there was no overtime work on a Sunday; and that she later learned from a temporary employee named Jason that he worked on the Sunday in question. On cross-examination, Peggy Heiden testified that she worked overtime on weekends after December 6, 1998; that she worked Saturday December 12, 1998, but not Sunday December 13, 1998; that she believed that she worked on Saturday December 19, 1998; that when Malinkowski worked on the weekend in question he did 100-percent inspection which is a job that she had done in the past; and that her knowledge of the involved Sunday overtime came strictly from what Malinkowski told her. On redirect, Peggy Heiden testified that Sunday was double time pay.

Lefief testified that the 100-percent inspection operation is not considered a permanent operation in the Dundee facility and temporary employees and not regular employees are used in the operation; that two of the temporary employees used in this operation are Jason Malinkowski and Deborah Cole; that the inspection is actually a cosmetic inspection of the parts which the testing people are not involved in; that occasionally regular employees did get involved in the 100-percent inspection operation; that he did not remember Hatcher or Peggy Heiden working as 100-percent inspectors; that in his view somebody familiar with production testing would have immediately transferable skills to 100-percent inspection; that he and Burnett arranged the overtime for people who worked in assembly, winding, potting and testing; that Jerry Folmer, who was the quality assurance manager, and his assistant, Kathy Miller, would have scheduled the overtime work on Saturday December 12, 1998, by Malinkowski and Cole in 100-percent inspection; that the Company's Christmas Party was held on December 12, 1998; and that production employees had been working a lot of overtime and management decided that the production employees would have the weekend of the Christmas party off.

Nevins testified that the employees had been working a lot of overtime and in December 1998 Ikenaga shut the plant down for a couple of weekends; that the employees did not work the weekend of the Christmas party; that the employees also did not work the following weekend; that there was no production on these 2 weekends; that she did not have anything to do with the scheduling of Jason Malinkowski or Cole, who were temporaries who did 100-percent visual inspection of coils in quality control before they were shipped; and that she found out after the fact that these two temporaries worked on the Saturday of the Christmas party.

Hill testified that there was a lot of overtime up to the beginning of December 1998 and then it was basically limited to 100-percent visual inspection of the finished part; that the quality department did the 100-percent visual inspection work; and that two temporaries in that department, Cole and Jason, took their direction from Kathy Miller in the quality control department and her boss was Folmer.

Gene Bialy, who is the Respondent's vice president of human resources, sponsored Respondent's Exhibit 17 which shows the overtime worked by Peggy Heiden between November 30, 1998, and January 3, 1999, and Respondent's Exhibit 18 which shows the overtime worked by Janice Hatcher during the same period. He testified that generally the plant did not work overtime on the weekend of December 12 and 13, 1998, which was the weekend of the holiday party, the weekend of December 19 and 20, 1998, and the weekend of December 26 and 27, 1998; that temporaries Malinkowski and Cole both worked about 4 hours on Saturday, December 12, 1998, doing 100-percent testing getting shipments prepared for shipment to Chrysler the first thing Monday morning; that Quality Manager Folmer would have scheduled this overtime; and that Peggy Heiden or Hatcher should not have been called for this overtime because the decision to work in 100-percent inspection was sometimes very spontaneous and Cole slices sample cores as part of a quality test and he did not think that anyone else had this skill.

Bryan Kilburn, who at one time was a member of the UAW volunteer organizing committee and later was the midnight shift supervisor in mid-December 1998 (he became the midnight shift manager in January 1999), testified that a week before Christmas 1998 he spoke with Robert Bomia about the fact that when Bomia was working overtime he came in between 6:50 and 7 p.m. and when the afternoon shift took their lunch at 7 p.m. he went with them a couple of times and sat in the cafeteria for their 30-minute lunchbreak while he was on the clock; that Bomia's normal shift began at 11 p.m.; that he told Bomia that it showed a lack of integrity on his part and his probation was being extended; and that there was no mention of the length of such extension. Kilburn also testified that shortly after this discussion Bomia thanked him for putting in a good word for him so he would not lose his job but he was not going to rely on him anymore for his job security, he had decided to go with the Union. On cross-examination, Kilburn testified that he did not make any reference to the indefinite extension of the probation in Bomia's personnel file.

Hatcher quit the employees' VOC at the end of December 1998. She testified that she was tired of the Company harassing her so she decided to keep a low profile.

Peggy Heiden testified that as a member of the safety committee she reminded coworkers to wear safety glasses and to speak to supervisors if the employees were not wearing safety glasses; that between September and December 1998 there were certain employees who she observed not wearing their safety glasses from time to time, namely Laura Iott and Sue Barnier; that in December 1998 she spoke to Nevins about Iott not wearing her safety glasses and Nevins told her to mind her own business and get back to her line; that Iott did not start wearing her safety glasses after that; and that there were occasions that she did not have her safety glasses on the minute she got back to her workstation and Nevins was there to remind her to put them on. Nevins denied telling Heiden to mind her own business and get back to the line.

Kilburn testified that in January 1999 he was approached a couple of times by Bialy and Burnett regarding Bomia not following the Company's safety glasses policy; that he also saw Bomia not complying with the safety glasses policy and he gave Bomia a form to get company-paid safety glasses; that he provided Bomia side shields on numerous occasions; that he and Bialy decided to extend Bomia's probation indefinitely; that Bomia asked him the status of his probation at his 120-day mark; and that he never told Bomia that his probation had come to an end. On cross-examination, Kilburn testified that despite the fact that the wearing of safety glasses was a chronic problem with Bomia, he never wrote Bomia up for this.

On January 13, 1999, according to Peggy Heiden's testimony on cross-examination, Nevins told her and the other members of her line that their production had been low for a very long time and Heiden disagreed with Nevins. On redirect, Peggy Heiden testified that for 3 to 4 hours Nevins stood by her line and watched the employees working; that the employees asked her why she was standing there and Nevins said it was because the employees had pretty bad production for a long time; and that she then told Nevins that that was not true and in fact Kanomi Gomo, who was the assistant to Nevins, had just told them that there production had been better in the past 3 months than it had ever been. On recross, Peggy Heiden testified that Gomo was a production tracker; and that what he said was that for the 3-month period, October to December 1998, the output had been higher from her line than a prior 3-month period of October to December. Subsequently, Peggy Heiden testified that Gomo was referring to the day-shift production and overtime does not count toward day-shift production but rather overtime would count toward the next shift.

Peggy Heiden testified that at the end of January 1999 she was working with Peggy Chlebos, and Jan Hatcher and Nevins asked her why Chlebos was stocking the line; that she told Nevins that she did not know but perhaps it was because they needed material; that anyone running a line in the assembly department is allowed to stock the line; and that she asked Nevins if she was ever going to stop the harassment and Nevins said that she would never stop. On cross-examination, Peggy Heiden testified that this occurred right after Nevins had them on their hands and knees cleaning up the area, which was something that they normally did not do; and that there were many times that they cleaned up.

Nevins testified that as production grew the material handlers were not able to stock all the departments and so a fourth person was added to the assembly area and that person was supposed to stock the line so that the other employees would not have to leave the line; that the job of stocking would rotate on a daily basis; that on the day in question it was Peggy Heiden's turn to do the stocking of the line; that the reason a designated person does the stocking is to make sure that the first person on the line, the one who is doing the coring, sets the pace for the production line and should stay on the line and not be stocking; that she saw Chlebos off the line doing her own stocking and Peggy Heiden was talking to a temp; that she took Chlebos's place and she asked Heiden why she was not doing the stocking; that there are six points on the line which have to be stocked about every 2 hours; that Heiden asked her if she was going to keep harassing her and she told Heiden no but she wanted Heiden to do her job; and that she did not say that she was not going to stop harassing her.

The Respondent and the Union, as indicated above, entered into a settlement agreement which was approved by the Regional Director for Region 7 on February 1, 1999. General Counsel's Exhibit 3. The agreement contains a nonadmission clause and indicates that the Respondent would comply with the terms and provisions of a notice which it posted. The notice indicates that the Respondent will not (1) do anything to interfere with the employees' Section 7 rights, (2) indicate to employees that it would be futile to elect the Union as their representative by telling them that it would not continue to operate its Dundee facility if they chose to be represented by the Union, (3) take adverse action against, counsel or otherwise discriminate against employees, including changing the breaktimes of Reutz or making departmental transfers of Janice Hatcher because of their activities on behalf of or in support of the Union, (4) question employees' loyalty to the Company because they engaged in activities on behalf of or in support of the Union, (5) coercively interrogate employees about activities on behalf of or in support of the Union, (6) threaten employees with loss of employment or unspecified reprisals because of their activities on behalf of or in support of the Union, (7) engage in surveillance of its employees' activities on behalf of or in support of the Union or create the impression of surveillance, and (8) maintain or enforce an overly broad no-solicitation rule or similar rule, and the Respondent will rescind (A) the counseling of Peggy Heiden on September 4, 1998, and (B) any overly broad no-solicitation or similar rule. The RC case was settled with the Respondent and the Union agreeing to a rerun election on April 29, 1999.

On February 6, 1999, the Respondent changed its no-solicitation and distribution policy, General Counsel's Exhibit 11, so that it prohibited its employees from soliciting during their working time or the working time of the employee being solicited, and prohibited employees from distributing literature in working areas at any time or in nonworking areas during their working time.

Peggy Heiden testified that Nevins had gone on medical leave and returned in February 1999; that Steve Burnett, who was the production manager, told the employees in assembly that Nevins would no longer be their supervisor and she was in human resources doing light duty; that after that she reported to Steve Burnett; and that Nevins continued to work in human resources all of March.

Ryan Clark, who was hired by the Respondent through a temporary agency in January 1999, testified that in late February or early March 1999 Nevins, who he thought was a supervisor on the day shift, approached him and some other temporary employees, including Tim Proskie, about 3 or 4 a.m. Clark testified (Tr. 65) that Nevins

> inquired about if anyone had been bothering us about voting for the union. And I stated, no. And then I kind of tuned her out. Well, she had the conversation with the other people because I was busy setting bobbins. And she went out [sic] to state that Diamond would not have any . . . would not tolerate anyone bothering us to vote for the union. And then she went on to say that Diamond would lose its small close atmosphere, like the small work place atmosphere if the union got in there. And she hinted about Diamond losing customers if the union did get into Diamond.

Clark also testified that he had never been harassed at Diamond Electric by anyone to vote for the Union, and he had never complained to anyone in management at Diamond Electric about any kind of harassment. On cross-examination, Clark reiterated that he could not recall the words Nevins used when she referred to losing customers and a small atmosphere.

Nevins testified that she knew Clark in that she and Brodie interviewed Clark; and that she did not have the above-described conversation or discussion with Clark.

On March 16, 1999, according to the testimony of Peggy Heiden, Tonya Brodie, who worked in human resources, brought a temporary employee into the factory to work on the line she was working on, Peggy Chlebos complained because the temporary was slowing down production, and she paged Steve Burnett and the temporary was taken off the line.

On the morning of March 17, Burnett brought the temporary back to help on her line. Peggy Heiden testified that Chlebos complained again and the temporary was taken off the line again; that less than 1-hour later Nevins put the same temporary back in her line again; that Chlebos started to complain again because the temporary was not able to keep up; that Chlebos paged Supervisors Burnett or Nathan Iott over the factory's public address system; that when they did not reply, she paged "Steve Burnett or Nathan Iott to the assembly area"; that Nevins then telephoned her and asked her what she wanted; that she told Nevins that she wanted to speak to Burnett or Nathan Iott and Nevins said that if it was about the temporary employee she could forget about it because he was staying on the line; that when she asked Nevins why Nevins said "[b]ecause I said so and because you need the help"; that she told Nevins "fine," hung up the telephone and went back to her department; that shortly thereafter Nevins approached her and said that they had to talk; that she told Nevins it was not a good time because they had to make production; that Nevins told her that they would talk then or she would have to punch out and go home; that Nevins led her into Gene Bialy's office in human resources; that neither Bialy nor anyone else was in the office at the time; that Nevins closed the office door and stood in front of it; that Nevins said, "I want you to sit down and you will not dictate to me. I am still your supervisor. You will listen to what I tell you to do. I am sick of your crap" (Tr. 384); that she asked to have Bialy present and Nevins said that she did not care what she wanted and she should sit down; that when she refused to sit down unless Bialy was there, Nevins "kind of shoved" her and Nevins said, "I wouldn't have to shove you if you would sit down and shut up"; that she tried to get out of the room and Nevins "kind of stopped" her; that she told Nevins that Burnett had said that Nevins was not her supervisor at the time and Nevins said that she did not care what anybody told her, she was still in charge and she was still her supervisor and Heiden would listen to her; that she could see three woman standing at the desk outside the human resources office through the window in the office, and as she attempted to leave the office and Nevins again pushed or shoved her and she yelled at the women outside the office "Would one of you guys please

call Gene Bialy in here," that none of the women responded to her request; that she then again attempted to leave the office and this time Nevins moved out of the way saying, "This isn't over. This isn't over yet. We're not finished with this yet."; that subsequently one of the three women, Debbie Stevens, approached her and she asked Stevens why she did not help her in the office; that Stevens said that she did not know what to do, she could not believe what she was seeing, and Nevins had no right to touch her like that; that later that day she spoke with Bialy twice but he told her that he did not have time to talk to her and she should go home and he would telephone her at 4:30 p.m.; that when Bialy did not telephone her by 7:30 p.m. she telephoned the Monroe County sheriff's department to report what she believed was an assault by Nevins; that a deputy sheriff came to her home and took her statement; that while the deputy sheriff was at her home Bialy telephoned her and said that he was going to try to talk with her the following day; that the deputy sheriff asked to talk with Bialy; that she overheard part of the conversation on another telephone; that Bialy told the deputy sheriff that he believed that the confrontation evolved from her union activities; that she did not file the complaint against Nevins; that she telephoned Bialy back later that night after the deputy sheriff left; and that Bialy told her that they would discuss the incident the next day. On cross-examination, Peggy Heiden testified that she refused to sit down in Bialy's office because Nevins yelled at her to sit down; that she told Nevins in Bialy's office that she was not her supervisor; that she tried to leave the office; that Nevins placed her hand on Peggy Heiden's shoulder preventing her from leaving the room; that Nevins actually pushed her toward a chair as she tried to leave; that it was not a common touch because Nevins was pushing her back trying to get her to sit down, and it was like a shove but it was not a hard shove; that she was able to get out the door when Nevins moved away from the door when she yelled for the "girls" to get Gene Bialy; that she just talked to the deputy sheriff and she did not fill out any forms; that she decided not to pursue a criminal complaint against Nevins because she wanted to see if the Company could take care of it without further involving the sheriff's department; that she asked the deputy sheriff if he could go to Diamond and speak to someone in management, and he told her that if she was not filing charges, there was no point; and that the deputy sheriff told her that he told Bialy that she had decided not to file charges.

Nevins testified that while at the time she was still doing a lot of her duties on the floor, there was an assignment in human resources as of late January or February 1999 because she was having a real hard time standing all of the time with her back; that she was still a supervisor and she did the start of the shift meetings every day; that she was still Peggy Heiden's supervisor on March 17, 1999; that on March 17 she put a new temporary employee, the only temporary employee that she had that day, on the assembly line working with Peggy Heiden; that she went out on the floor and saw that the temporary employee was not on the line and the line was down to three employees; that she spoke with Nathan Iott and she took the temporary back to the line and told Heiden that the temporary needed to stay on the line; that Heiden said, "well fine"; that a couple of minutes later she heard Heiden page Nathan Iott over the public address system; that she called Peggy and asked her what she needed to speak to Nathan Iott about; that she told Heiden that if it was about the temp, he needed to stay; that Heiden hung up on her; that later she found out that Heiden had requested Nathan Iott to take the temporary employee back out of the area; that she went to talk to Steve Burnett and Nathan Iott; that they agreed with her that if a temp is placed in a job, that person should stay there; that Burnett said that she should talk to Peggy Heiden about it; that she asked Peggy Heiden to come with her to human resources; that Heiden did not resist going to human resources; that she took Heiden into an office and the door was closed; that she asked Heiden to have a seat and Heiden refused; and that she told Heiden that

> she had not right to give other job assignments to employees and I am the Supervisor on the floor and that is the only temp we had and that I needed him to work there and that she did not have the right to call Nathan Iott to undermine my authority by having him change what I had done. [Tr. 854.]

Nevins further testified that Heiden said the temp was too slow and she told Heiden that there wasn't anyone else and they needed that fourth person; that Heiden asked to have Bialy there; that she told Heiden that she did not need Bialy there; that it was heated and loud in the room; that no physical contact occurred between the two; that she was standing by the door; that Heiden again asked for Baily and she asked the girls outside the office to get Baily; that Heiden said that she wanted to leave the office and she told Heiden that they should discuss the situation; that Heiden said that she wanted to go, she wanted to get out of the office; that she was standing in front of the door and she pulled the door open and Heiden left the office; that they might have brushed shoulders but that was it; that at no time in Baily's office did she have contact between her hand and Heiden's shoulder or vice versa; that she did not say to Heiden as she was leaving that this isn't over yet or we are not finished; and that she went and talked with Steve Burnett, who was her supervisor at the time, and Baily. On cross-examination, Nevins testified that after she hurt her back she would occasionally work on the line as a working supervisor but she spent about 4 hours a day in human resources doing clerical work; that on a day-to-day basis other supervisors had to answer pages when employees needed some help and the machines were down but they usually paged her first; that she still passed out all of the assignments; that Nathan Iott was the potting supervisor, who worked in the potting department and he was helping out on the floor when she was in human resources; that Nathan Iott was not a supervisor he was a team leader; that Peggy Heiden had told Nathan Iott that the temp was slow and he was slowing everybody down; that Peggy Heiden did not tell the temp to get out of there and go do something else; that after she told Peggy Heiden over the telephone that the temp had to stay on the line she heard Heiden paging Nathan Iott again; that she was upset; that she was not standing between Heiden and the door in Bialy's office in that she by the opposite side of Bialy's desk; that she was by the door but she was not in front of the door; that Heiden mouthed the words "call Gene Bialy" to the employees outside the office; that she

told Heiden that they did not need Bialy; that she did not remember who opened the door; and that she did not put her hands on Heiden.

On March 18, 1999, Peggy Heiden met with Bialy and Paul LeFief, the plant manager. She testified that she was told that she should go home until she was told to come back.

Nevins testified that on March 18, 1999, she met with Bialy who told her that Heiden had reported the incident to the police and he thought that it would be best if she went home so that they could investigate and find out what was going on; and that on that day she explained to Bialy what happened.

On March 18, 1999, the Respondent's employee Robert Bomia was terminated. He began working for the Respondent on October 5, 1998, as an assembly worker on the midnight (first) shift. Bomia testified that he became a union supporter before the Respondent's annual Christmas shutdown and he demonstrated his support by wearing a UAW button on his shirt while he was at work; that he began wearing the UAW button after the shutdown when they came back from vacation; that he showed his supervisor, Bryan Kilburn, the UAW button he was wearing in December 1998 right before the shutdown and he told Kilburn that from that point on he was with and for the Union; that later that day Kilburn asked him if he put the Union button due to the Steven Burnett incident;[3] that the day after the Burnett incident, Kilburn told him that his 90-day probationary period was going to be extended for an additional 30 days because of the incident the day before; that he completed his probationary period "towards the middle of February" 1999 when Kilburn told him that he was off probation; that he began wearing the UAW pin from the end of December and continued wearing it for the next 2 months; that he attended union meetings and he talked to his coworkers in the cafeteria during lunch in support of the Union; that he generally worked on the ignition coil assembly line; that the Company has a training procedure under which assembly employees are certified after they are trained on a particular job; that he was certified on the ignition coil assembly line; that General Counsel's Exhibit 6 is the training check list for the ignition coil assembly; that the rail coil assembly line is a different job on a different assembly line; that he was never certified on the rail coil assembly line and he never filled out any training check list for rail coil assembly; that there are two job stations on the rail coil assembly line; that at the first job station on the rail coil assembly line the employee places bobbins in the cases and then the unit is soldered by the machine; that at the second job station on the rail coil assembly line the employee makes sure that the unit is properly soldered, puts a lid on it, places it on an electric test machine, and then places the unit on a metal tray along with four other units and sends it off on the line; that before March 17, 1999, he had worked at the first station on the rail coil line but he had never been assigned to work the second station; that he was not trained on any particular aspect of the job at the second station on the rail coil line; that the last night he worked for the Respondent he worked the first 4 hours at the first station of the rail coil assembly line; that for the second 4 hours he made sure that the solder was on and he tested the units at the second station of the rail coil line; that he did not notice that there was anything wrong while he worked at the second station; that when the day shift came in Laura Iott asked him if he knew that there was a problem with the parts and he said no; that Iott showed him that the solder was not equally leveled and the parts had to be reworked; that Iott did not specify how many parts had to be reworked; that he did not notice the problem while he worked at the second station because he had not been told what to look for; that he stayed beyond his shift and helped fix the parts; that about 8 a.m. Burnett told him that Gene Bialy and Bryan Kilburn wanted to see him in the human resources office; that Bialy, with Kilburn present, said that he appreciated his help fixing the problem with the rail coils, they would have to shut down the day shift so they can fix the parts, that was a serious problem, and he was terminated and should empty his locker and leave; that the only reason given by Bialy at this meeting for the termination was "problems in the past"; that the only past problem he was aware of was the extension of his probation for 30 days; that Shannon Perky worked with him on the rail coil assembly line that last night; and that Perky was certified on the whole rail coil assembly line.

On cross-examination, Bomia testified that on Monday, March 1, 1999, he started training on the rail coil line with two mentors; that the week of March 8, 1999, he was taken off the rail coil line on Thursday and Friday and sent back to ignition coils; that on March 15 and 16, 1999, he worked on the ignition coil line, and on the night of March 17, 1999, which was his last night working for the Respondent, he was sent back to the rail coil line; that at the second station on the rail coil line the test could show that it was fine even though it was not soldered properly; that he was aware that in December 1998 there was a problem with defective rail coils being returned from Chrysler because they were not properly soldered; that he did not know that the machine had been changed since December 1998; that since machines can have problems, the most significant thing that the employee did on the second half of the rail coil assembly line was to inspect the solder; that on the night of March 17 and the morning of March 18, 1999, he and Perky made a total of 340 rail coil units during their 8-hour shift, and about one-half of these units went through when he was at the second station; that on the morning of March 18, 1999, he and Laura Iott inspected about 170 of the rail coil units that were produced during the second half of the shift and more were bad then were good; that he did not know how the rail coil units produced during the first half of the shift turned out; that during his meeting with Bialy he did not tell Bialy that he just let the defective rail coil units just slip by, and he did not tell Bialy that he intentionally let it happen; that Nevins spoke to him twice, on November 9, 1998, and in January 1999, about the eyeglass safety requirement; that he received a pair of company prescription safety glasses, lost them and was given another pair; that in December 1998 Bialy talked to him because he was out of compliance with the eyeglass rule; that Kilburn asked him twice about wearing safety glasses; that the eyeglass safety rule was not discussed at his March 18, 1999 termination meeting with Bialy and Kilburn; that he started wearing a union button

[3] The Burnett incident involved Burnett in late November or early December 1998 asking Bomia if he clocked in 15 minutes before his starting time and telling him not to do it again.

right before the Christmas shutdown; that he estimated that at that time there were 20 to 30 employees wearing union buttons; that according to his affidavit to the Board, when he interviewed with the Company in September 1998 he took a pencil and paper test, there was a question in the test asking "do you think a Union would be good for the Company" and three answers, namely, "yes," "no," or "it does not matter," and he choose the last answer; and that this assertion was a mistake on his part in that there was no such question on the test.

On redirect, Bomia testified that he was not disciplined regarding wearing safety glasses and he had not ever received a writeup for not wearing his safety glasses; that when Nevins spoke to him in the fall of 1998 it was the end of his shift, he was not working, and he had removed his eyeglass side shields; that Kilburn spoke to him when he first came in one night and Kilburn got him a pair of side shields; that Bialy spoke to him about safety glasses after he took the side shields off as his shift was just about over; that when he worked on the rail coil line during the week of March 1, 1999, and for a part of the week of March 8, 1999, he worked on the first half of the line and never the second half; that the defective rail coil units produced on the midnight shift of March 17–18, 1999, had solder but not enough solder; that no one told him how much solder had to be on each of the coils until the morning he was fired; that there is a certification process for the rail coil line and the process includes forms similar to General Counsel's Exhibit 6; that he never received a writeup from the Company charging him with the theft of company time or dishonesty; and that Laura Iott told him not to feel bad because it was not just his parts.

On recross, Bomia testified that on March 18, 1999, after it was recognized that there was a problem, he visually inspected the machine and he saw where the solder was improperly curled up and around in the machine; that he could not see the area where the machine malfunctioned with respect to the solder when he was working the second half of the rail coil line; that there were two spools of solder and one was going but the other one was not, resulting in the joints getting soldered but they were not getting enough; and that the rule at the plant is that safety glasses have to be worn while a person is in the plant.

Subsequently, Bomia testified that he had never filled out another application at another company with the language about a union in it and he could not explain where such language came from; and that it would be difficult for someone who had no experience to determine whether there was a sufficient amount of solder on the poles of the rail coils.

Bomia further testified in response to questions of the Respondent's counsel that the midnight shift of March 17–18, 1999, was the first time he had worked at the second station on the rail coil assembly line; that the reason he included the assertion in his affidavit about the question regarding unions in his preemployment profile with the Respondent is that he was verbally asked during the interview process how he felt regarding unions and he told them it didn't matter either way; and that when he first started at the Respondent it was still going through all the union stuff. Bomia later testified that Brodie and Burnett verbally asked him about his feelings about the Union and this fact was not included in his affidavit to the Board. Neither Brodie nor Burnett testified at the trial herein.

Respondent's Exhibits 8 and 9 are a photograph of the open rail coil unit and a drawing of the unit, respectively.

Peggy Heiden testified that she worked with Bomia on overtime and he was a very good worker; that she worked the day shift at the time that Bomia was terminated and he worked the midnight shift; that between 7:15 and 10:45 a.m. she repaired between 50 and 60 defective parts which were incorrectly soldered and there were also wire mis-routes; that she and Ron Bauer repaired the rail coils and Laura Iott was taking the defective coils off the potting line; that she did not know how long Bauer continued to repair the defective coils after she stopped at 10:45 a.m.; that she had worked on the rail coil assembly line herself; that the Company has a certification procedure to qualify for a particular job; that there is a certification procedure for the rail coil line; and that to be certified the employee has to be trained by a certified operator

> to know how to run all of the automation, to know how to do the beginning and the end of the line, which is coring and testing and the soldering. You have to know how to visually inspect them. You have to know to look for any quality defects, either mis-routes or bad solders. You also have to inspect cases—it's a visual inspection on cores and the bobbins. You are required to differentiate the different codes on the test machine. To actually run the automation. You know, when an alarm goes off, to know, you know, what is wrong. [Tr. 410.]

Subsequently Peggy Heiden testified that when she ran the coil line it was an everyday occurrence that they had to repair between 10 and 15 parts by removing the plastic cover from the unit; and that at that time the cover was put on after the visual inspection and before the part was tested.

Ruetz, who was a tester on the midnight shift until the third week of February 1999 when she went to Molding, testified that while she worked at the Respondent she heard about employees Laura Iott, Ron Bauer, and Chad Naugle producing defective parts; that in February 1999 Naugle took a mold apart and put it back together in the wrong firing order and there was quite a few pieces that were already potted and shipped to Chrysler by the time the problem was found; that in December 1998 Laura Iott and Bauer ran over 2000 pieces with bad solder; that Iott and Bauer wore management "walk and talk" buttons[4] and they were not terminated; and that Chad Naugle had been a union supporter at one time but he was no longer supporting the Union when his mistake occurred, and he was not terminated. On cross-examination, Ruetz testified that she had already left the Respondent when the incident occurred which resulted in Robert Bomia's termination; that Kathy Miller in quality control told her about the bad solders done by the day shift and since at the time Laura Iott and Bauer were the only ones certified to run rails on day shift, she concluded that the bad solders were done by Iott and Bauer; that in December 1998 the Company did have quality problems on the rail coil

[4] According to Ruetz, they meant if the Union was not voted in, management would work with the employees to make it a better place to work.

line; that approximately 1 week before the September 1998 Board election Naugle switched his allegiance to the Company and this previously visible union supporter told everyone that he had switched his allegiance to the Company; and that she took into consideration, in determining the number of parts Naugle made the mistake on, usually four crates are shipped to Chrysler every morning and there are 380 parts in each crate.

Jernigan (Cook) testified that Bomia asked her about organizing for the Union, he wore a union button and sometimes the shirts (on Friday dress down days) at work and he talked about the Union on his breaks and at lunch. Jernigan also testified that in February or early March 1999 Rachel Saylor was training for a material handling job and she picked up three cases of rail coils and accidentally damaged beyond repair about 400 rail coils; that she was aware that the parts involved in the Bomia discharge were repaired; that Saylor still worked for the Respondent at the time of the hearing herein; that she was not aware of Saylor being disciplined over the 400 units which could not be repaired; that Saylor told her that she was a vote against the Union; that she was aware that in February 1999 Chad Naugle cleaned a mold and did not put the firing order numbers back in the mold in the proper order resulting in 6000 cases having to be repaired or scrapped; that she was not aware whether Chad Naugle, who did not support the Union, was disciplined over this; and that at one time Chad Naugle supported the Union but he told her that he did not support the Union from about 2 weeks before the election in September 1998. On cross-examination, Jernigan testified that she personally assisted in sorting out the defective parts after Chad Naugle accidentally switched the firing numbers on the molds; that she talked to Saylor about the 400 rail coils she damaged; that Saylor was not a new employee but she was new to the job she was doing when she damaged the 400 rail coils; that she damaged the 400 rail coils when she hit a heating duct while operating a forklift; and that she did not see Saylor's accident.

Lefief, who no longer worked for the Respondent at the time he was called as a witness by the Respondent at the trial herein, testified that previously there had been soldering problems extensively on the rail coil line; that at the outset, the manufacturer of the machine was at the Respondent's Dundee facility on a weekly basis reprogramming the machine; that alarms were installed to indicate when the solder was not feeding; that employees were trained and then given more extensive training; that the employee who operated the second position on the rail coil line was retrained to be more diligent on the inspection of the terminals through the process; that there were many defective rail coils because of soldering problems up until Christmas 1998; that Bomia's probationary period was extended because Bomia was punching in and not going to his workstation, but rather he went on break with the other shift and he was paid for it; that he did not believe that the extension was for a specific period of time and he and Bomia's supervisor, Bryan Kilburn, were going to look at him during a period of time but there was no set period; that the training for the two positions on the rail coil line was combined and not separate; that Bomia was not trained just on the first position on the rail coil line because the teams were trained on both operations; that each operation in the facility has instructions at the station, and the instructions at the second station on the rail coil line explains the inspection of the solder joints; and that he viewed the defective parts and some were not soldered at all and others were inadequately soldered; that he was a participant in the discussions regarding the decision to terminate Bomia and he agreed with the decision to terminate Bomia because:

> We had gone through a period of very very difficult time with this piece of equipment. The training was extensive. The criticality of the operation was known throughout the plant. . . . And it seem[ed] to be [a] blatant disregard for the responsibility of the job. [Tr. 617.]

Lefief further testified that someone did say Bomia had not been trained on that job but Kilburn said that was ridiculous, he had trained Bomia, and Bomia had gone through the training and became a certified operator; that he did not know who raised the issue of lack of training; that he did not know that Bomia was a union supporter; that if the employee working the second station on the rail coil line gets three parts which are not soldered properly the employee is supposed to inform the supervisor of the problem; that the task of watching the part come through the solder machine, visually inspecting it is the same task on the other two nonrail coil assembly lines; that for Bomia to miss finding that 300 pieces were not properly soldered in one night was a "blatant disregard for . . . [his] responsibility. . . . Okay. Nobody misses that many solders. Nobody" (Tr. 623); that while Saylor, who was in her training period, took more than the Hi-Low could handle, lost the load and dropped the parts, it was her instructor's fault; that Chad Naugle was not fired for causing a number of parts to be recalled from Chrysler because Naugle's supervisor did not make sure that the part was in conformance with the specification, he did not catch the mistake; that all of Naugle's responsibilities were his supervisor's, Burnett's, responsibilities; and that Burnett left the Company. On cross-examination, Lefief testified that he did not discipline Burnett over the Naugle incident where 580 parts had to be taken back from Chrysler after it was determined that they were defective; that because Naugle was in training he was willing to cut him some slack with respect to his problems; and that Bomia was pretty new to the rail coil line. On redirect, Lefief testified that visual inspection of solder joints and running a continuity test are tasks that Bomia had done on other lines and he was trained in those particular tasks on all lines; and that he did not know if Naugle was a union supporter. Subsequently, Lefief testified that when an automobile manufacturer such as Daihmler-Chrysler audits the Respondent's work one of the things they want to establish that the employees that the Respondent is using are certified to conduct the function they are performing; that the automobile manufacturer wants to be able to look at a document which certifies that an individual can perform the function that he is doing; that for Bomia there is a document, a certification showing that he was trained at station two on the rail coil line; that he could not determine looking at General Counsel's Exhibit 6 that Bomia was certified at station two on the rail coil line; that he personally had observed Bomia working at station two on the rail coil line at least 10 times (described as a couple of weeks worth) before March 17–18, 1999; that General Coun-

sel's Exhibit 6 refers to line numbers one and two but not to line number three, which is the rail coil line; that it takes about a week to become certified on a line; and that it is possible that the time he saw Bomia on the second station on line three before March 17–18, 1999, he was working on getting his certification. The Respondent stipulated that the only training check list form in Bomia's personnel file is the one represented as General Counsel's Exhibit 6.

Reid testified that Respondent's Exhibit 12 is the work instructions which tell the operators how to perform their jobs; and that each station has its own work instructions. Reid did not remember how many stations there are on the rail coil line. Subsequently, Reid testified that the instructions do not indicate exactly how much solder should be placed on the terminals but that would come from a workmanship standard which is separate from the instructions; that the workmanship standards would be a part of the training for the certification; and that the employee would be taught the workmanship standard first and then he would work with a mentor as part of the training process. On redirect, Reid testified that when an operator joins the Company he or she is trained in the workmanship standard for solder and whatever line he or she is working on it is the same standard. Reid did not believe that there would be any separate training on a workmanship standard for solder with respect to the rail coil line that would not apply to the other assembly lines. On recross, Reid did not know that there is a specific difference between the lines for certification. Reid believed that there is only one certification. Subsequently, Reid testified that if the operator learns what a good solder is and a bad solder is, it should pertain across the board on any of the assembly lines, and as far as the inspection of soldering is concerned, there would not be a need for a separate certification for the rail coil line.

Nevins testified that she noticed that Bomia did not have his side shields or safety glasses on and she went to human resources and got him a pair; that she told Bomia that the Company paid for safety glasses; that later she saw Bomia again without his safety shields on and she got him another pair; and that she told Kilburn and Bialy about Bomia not following the safety eyeglass rule. Subsequently, Nevins testified that she believed that QS-9000 speaks to maintaining certification records for employees even after the employee leaves the Company; that as a supervisor she oversaw the training and certification process for her employees and she turned the certifications over to human resources; that if an employee completes training and is certified that certification is turned over to human resources and if the employee then leaves, she did not believe that it would be the prerogative of the supervisor to discard the certification; and that she has never discarded a completed certification because an employee left the Respondent. On further direct, Nevins testified that with respect to terminated employees she is not personally aware of the QS-9000 record keeping requirements for training checklists or certifications.

Kilburn testified that Bomia underwent rail coil training the first 2 weeks of March 1999; that in the preceding 5 months Bomia had worked on the ignition coil and side pole assembly lines where his performance was fine; that Bomia had a tendency to wander away from his station; that he initialed Bomia's checklist (certification) for "Assembly," General Counsel's Exhibit 6, which covers all except the rail coil line; that as far as the soldering part of the job is concerned the rail coil line is similar to the other lines in that they are automated soldering machines and a good solder is the same; that he was present during the first 2 weeks in March 1999 when Bomia was trained on the rail coil line; that he checked Bomia's progress on the training checklist and towards the end he had Bomia perform the task, observe it and then sign the training checklist; that he approved Bomia's training checklist for the rail coil line and he placed it in a box on his desk; that at the end of March 1999 he went through the box on his desk and since Bomia had been terminated he threw the certification away; that the certifications are done to comply with QS-9000 and the Company gets audited; that spot checking would not occur for a terminated employee; that he is not aware of a situation where there was a problem with a part and there was a post-audit to see if the person who worked the part was certified; that in the past he has thrown away training checklists where the employee is short term or temporary, they had just started the checklist, and they quit; that when Bomia asked him to sign the certification he was working the second station of the rail coil line and he, Kilburn, asked Wayne Jeffers if Bomia was ready to be certified; that Jeffers replied in the affirmative; that the second station on the rail coil line is the same as the other assembly lines, except for the wire wrap; that on Monday March 15, 1999, Bomia worked on the ignition coil line because the Respondent was short-handed on that line; that the rest of that week Bomia was assigned to the rail coil line; that on March 18, 1999, at 7:15 a.m. Ron Bauer told him that there was a problem with the solder machine on the rail coil line; that the solder was not flowing properly and it was backed up to a degree indicating that it had not been working for about 3 hours; that the area where the solder was backed up was visible from station two on the rail coil line; that observing the soldering operation would be a part of the duties of the operator at the second station; that the solder was not good on about 300 coils; that he told Bialy what happened and he and Bialy spoke with Bomia; that during the meeting Bomia was asked if he had been trained to do the job and Bomia answered yes; that Bomia said that he did not know how it happened; that Bialy told Bomia that they appreciated the fact the Bomia stayed to help with the situation but he was terminated in view of his past record, the problems he had, the fact the he had never gotten off of probation, and the issues of his integrity and work habits; and that Shannon Purkey was given an oral warning. On cross-examination, Kilburn testified that when he wrote up the discipline for Purkey, General Counsel's Exhibit 40, he had not determined yet at what point the solder machine had failed on the shift. In the writeup Kilburn indicated as follows: "We were unable to determine at what point the solder machine had failed during the shift. That meant that all coils assembled had to be 100 percent audited, pulled off the pallets, and repaired. Thus, we lost one shift of manpower plus one shift of production needlessly." Kilburn further testified on cross-examination that while Bomia submitted a "Right To Be Heard" form regarding his termination, General Counsel's Exhibit 41, he did

not believe that someone who was terminated could use this approach; that the Company did not tell him that he could throw away a certification after someone is gone; that he did not speak to anyone in management about discarding Bomia's certification; that it was during the second week of March 1999 that Bomia completed his training and was certified; that there is nothing on General Counsel's Exhibit 12, the work instruction sheet, that tells someone to check the solder cup to see if excess solder is dripping down; that when he first met with Bialy on March 18, 1999, he recommended to Bialy that Bomia be terminated; and that Bialy decided to terminate Bomia after he spoke with him on March 18, 1999. On redirect, Kilburn testified that he prepared Purkey's writeup at about 7:35 a.m. on March 18, 1999; and that the machine has an alarm for the temperature of the solder but it does not have any way of telling when the malfunction occurred. Subsequently, Kilburn testified that he actually witnessed Bomia performing the tasks on station 2 on the rail coil line before initialed Bomia's certification; that he witnessed Bomia working at station 2 on the rail coil line on 8 or 9 different days; that he was satisfied, based on his personal observation of Bomia working at station 2 on the rail coil line that he was proficient with respect to the inspection and testing; that once the certifications are completed they are turned in to and kept in human resources; and that he never asked human resources for permission to discard training checklists or certifications. The Respondent stipulated that the certification for the other two assembly lines, General Counsel's Exhibit 6, was contained in Bomia's personnel file after his termination.

Bialy testified that it came to his attention that in December 1998 Bomia punched in prior to his start time; that Kilburn explained to him that Bomia was a relatively inexperienced employee and he did not believe that the behavior was on purpose or malicious; that it was decided to extend Bomia's probation for an indefinite period of time until he could demonstrate that he was a "good and loyal" (Tr. 1106) Diamond employee; that there is no documentation in Bomia's personnel file regarding this but while Kilburn said that he provided the documentation to human resources, it never actually was placed in Bomia's file (The Respondent did not supply such documentation even if it was not placed in Bomia's file.); that it was reported to him by Nevins and Kilburn in December 1998 or January 1999 that Bomia was not wearing his safety glass side shields; that on March 18, 1999, Burnett told him that some of the rail coils had gotten through without proper solder; that later Kilburn came in and told him that Bomia was responsible for checking the solder, Bomia was the cause of the problem and that Bomia should be terminated; that he told Kilburn to bring Bomia to his office; that while Kilburn went to get Bomia he, Bialy, spoke to Lefief who said that if Bomia could not provide any justification, he would support the recommendation of Burnett and Kilburn to terminate Bomia; that when he and Kilburn subsequently met with Bomia he asked Bomia if he could provide an explanation and Bomia said that he did not have an explanation for what happened; that Bomia said that he knew that he was supposed to inspect the solders and he was trained on that aspect of the job; that when he received Bomia's right to be heard form he sent a letter back to Bomia indicating that it did not apply to termination decisions; that it was his "observation that the training [of Bomia] on that station [two on the rail coil machine] had been completed by Bryan Kilburn" (Tr. 1114); that with respect to the Rachel Saylor incident, Lefief told him that the damage was caused by the Japanese advisor, Mr. Mitsumi, who had instructed Saylor to get the load and move it back into the warehouse, and the load was too large and it tipped; and that with respect to Chad Naugle, Lefief told him that Naugle was not responsible since it was a highly technical and complex job and most of the responsibility for what occurred was Burnett's since he did not test and catch the problem before it got into production. On cross-examination, Bialy testified that he knew employee Wayne Jeffers; that he recognized General Counsel's Exhibit 46 as a Diamond discipline record form from the file of Jeffers; that this form relates to an oral warning for an incident on November 23, 1998, when Jeffers, while on the rail coil assembly line, produced 688 pieces of scrap because he failed to be sure that all terminals were soldered; that the Jeffers form is not signed by Jeffers or anyone in supervision; that he did not believe that employees were disciplined at that time on the rail coil assembly line, he thought that the incident was the first time that the problem had surfaced, and he believed that it was attributed to a failure of design in process; and that the Respondent does not generally keep records of discipline that is never issued.

On about March 20, 1999, according to the testimony of Peggy Heiden, Bialy telephoned her and told her that she was going to get some time off with pay, the Company brought in its own investigators to investigate the matter and they were going to be interviewing people and when they are finished she could come back to work.

On March 23, 1999, Bialy telephoned Peggy Heiden and told her that the interviews were finished and she could return to work the next day. Also on March 23, 1999, Baily telephoned Nevins and told her to come to the plant the following day.

On March 24, 1999, according to her testimony on direct, Peggy Heiden met with Bialy and Lefief. She testified that Bialy said that they had taken the matter very seriously because she telephoned the police and they had talked to the people in the factory; that Lefief said that she did an excellent job and she was there every day; that Lefief then presented her with a final warning, General Counsel's Exhibit 14, which reads, as here pertinent, as follows:

> This is a final warning to you regarding your observed and reported behavior on the plant floor. You have been violating Diamond Electric's work requirements, rules, and practices in that you have shown a pattern of behavior that includes:
>
> - Disruptive activity in the workplace which affects performance of other employees and the plant's production.
> - Disrespectful conduct toward supervision.
> - Substandard and intentionally poor work performance.
> - Statements made to other employees that you are working to cause a supervisor to be fired.
> - Leaving your assigned work without authorization or proper reason.

- Attempting to reassign work assigned to you, or take over the work assigned to another employee.
- Refusing to perform tasks assigned to you.
- Encouraging other employees to slow-down' their work.
- Extending your breaks; taking extra breaks without authorization.

This is a final warning that unless these inappropriate behaviors that have a negative impact on production and the cooperation we expect from all team members stop immediately, we will have no other alternative than to end your employment with Diamond Electric.

Peggy Heiden testified that she told Lefief and Bialy that she did not believe this was happening, they were making it look like she did something wrong and she did not do these wrong things; that they did not give her the specifics regarding any of the alleged incidents, and she had never been disciplined in the past for any of the instances of misconduct alleged in this final warning; that she never told other employees that she was going to cause a supervisor to be fired; that she had never engaged in any kind of a work slowdown; that she has come back late from a break but she does not routinely do that; that she was not in the practice of taking unauthorized breaks; that the outside investigators did not contact her to get her side of what may have happened in these alleged incidents; that Lefief and Bialy did not go through the allegations and try to get her explanation with respect to the alleged incidents; and that other than Nevins' above-described writeup, General Counsel's Exhibit 13, she had never received any discipline in the 6 years she worked for the Company; and that she never intentionally worked below standards, or reassigned work that was assigned to her. On cross-examination, Peggy Hardin testified that she actually came back 1 day later, March 25, 1999, because of a personal reason; that March 24, 1999, was another day of paid leave for her; that during the March 25, 1999 meeting Lefief told her that she was a good worker and her production had been good; that she considered General Counsel's Exhibit 14 discipline and she was told that it would be placed in her file; that she did not make statements to other employees that she was working to cause a supervisor to be fired; that about one week prior to March 17, 1999, she was in the accounting department during her work time and Nevins talked to her about it and also Nevins spoke to her about speaking to Coffey in another department at the end of the day shift; and that otherwise Nevins had not previously discussed any of the subjects which were listed in General Counsel's Exhibit 14. On redirect, Peggy Heiden testified that 1 week prior to March 17, 1999, she had a problem with sick time on her paycheck, she had gone on break and went to human resources, and she was told to speak to Debbie Stevens, who was the head of payroll; that she was still on her break when she was speaking to Stevens and Nevins came into the payroll office and asked her why she was there; that she was in the payroll office a couple of minutes after the end of her breaktime and she told Nevins that she had to get her sick leave taken care of; that Nevins told her not to worry about her sick leave and she needed to get back to work; and that Nevins told Stevens to forget it and she would take care of it.

Lefief testified that Nevins told him that she had been provoked by Peggy Heiden and Heiden was trying to run the assembly floor; that the Respondent's attorney, Shelly Cole, was asked to interview everyone who she felt was in the area or could add responsible information to what happened in this encounter; that he gave General Counsel's Exhibit 14 to Heiden and Respondent's Exhibit 11 to Nevins wherein he concluded that Nevins lost control of the situation when she met with Heiden on March 17, 1999; that Heiden did indicate that Nevins was not her boss; that he did not know that Steve Burnett, who was a production manager, told Heiden that Nevins was not her supervisor anymore; that he did not believe that Nevins was ever removed from active duty out on the floor; that two employees said that Heiden told them that she was working to cause a supervisor to be fired; that with respect to the next-to-last bullet in Heiden's final warning, he could not give a specific instance, he "never heard . . . [Heiden] say to someone, "I need you to slow down." (Tr. 653 which is testimony given on February 7, 2000 minutes before we adjourned for the day)[5]; and that he felt that Heiden during the March 17, 1999 incident exhibited a blatant disregard for supervision and it was insubordinate. On cross-examination, Lefief testified that Heiden told him that Nevins had touched her and she was trying to leave the situation and Nevins would not let her leave; that Nevins did not concede to him that she had put her hands on Heiden; that Cole was one of the attorneys that was representing the Company in response to the union organizing campaign; that he did not know if Cole was told to investigate Heiden's work history in general and he believed that Cole was looking into the Nevins-Heiden March 17, 1999 incident; that he was not aware of and he did not rely on General Counsel's Exhibit 13 in deciding to write up Heiden on March 23, 1999 (The Respondent stipulated that the only discipline in Heiden's file before the March 23, 1999 discipline is an attendance discipline dated "10/9/98".); that it was reported to him that Heiden had been heard telling people to slow down, they were going too fast but he did not know who the reports were from and he did not know the names of the employees[6]; that he believed that on March 17, 1999, Heiden told the temporary employee we don't want you on this line, go work somewhere else; that he did not know if Nevins was telling Peggy Heiden and the other people on that line what they should be doing; that the second bullet on

[5] This testimony was given in response to a question I asked the witness. Originally when testifying about this bullet Lefief testified "this statement came from her peers, her team members on her line that she would slow down a line." (Tr. 653.) It was then pointed out to the witness that "[y]ou're dealing with a situation that she's communicating to other employees that they should slow down."

[6] Tr. 689 and 691. This testimony was given on February 8, 2000, the day after Lefief originally testified, when asked about Heiden communicating to other employees that they should slow down, "I can't go to a specific instance. I never heard her say to someone, "I need you to slow down." (Tr. 653.) On February 7, 2000, Lefief did not allege that he had received reports from someone he could not identify about employees he could not identify. This allegation first surfaced after an overnight break in his testimony.

General Counsel's Exhibit 14 (disrespectful conduct toward supervision), refers only to the March 17, 1999 incident; that he never asked Heiden if she told employees that she was working to get a supervisor fired and he did not know which employees made this allegation; that he witnessed Heiden reassigning work in that he saw her on many occasions running a machine and telling someone else to restock it; that there is nothing wrong with Heiden telling someone else to restock and he did not write her up for doing this; that he never spoke to Heiden about leaving her work area and nothing was placed in her file about this; that on many occasions he observed Heiden extending her breaks or taking breaks without authorization and he was sure that he commented to Heiden but he did not have a recollection of that so he was not really sure; and that the discipline Heiden received was a message. On redirect, Lefief testified that Heiden told the people on the floor about the final warning; and that he considered termination for both Heiden and Nevins but he decided against it. Subsequently, Lefief testified that he did not remember if he read the written report regarding what the people outside the window witnessed on March 17, 1999, between Nevins and Heiden; and that he asked Nevins if she touched Heiden and Nevins said that she did not touch Heiden on March 17, 1999.

Nevins testified that she did not have contact with the Company's lawyers during the period while Peggy Heiden was suspended. Subsequently, Nevins testified that Heiden told temporaries to slow down and temporaries were given a hard time by Heiden because they did not slow down and because they were trying to hard to work; that she never spoke to Heiden telling her that she should not be telling temporary employees that they should be slowing down their work; that she never put anything in writing about Heiden telling temporary employees to slow down; and that she was never interviewed by Shelly Coe about what occurred with Heiden in Bialy's office on March 17, 1999. On cross-examination, Nevins testified that she was told by the temps that they were told to slow down and not work so fast after the September 4, 1998 counseling session; that they had several temps quit and not come back because of that reason; that she never asked Peggy Heiden for her side of the story; that it does happen from time-to-time that a new temporary employee is trying to do a good job and they go too fast; that the temporary employees told her that Peggy Heiden told them that they could not build up parts in the tray, and that as soon as the line stopped, they were to stop their function: that this is not correct; that she told the temporaries that if a machine was down, they were to still keep building and the temporaries told her that they had been told that they could not make any more; that even though the temporaries were new employees she accepted what they said and did not even ask Peggy Heiden about it; that on those occasions when the temporaries said that Peggy Heiden told them to slow down, they were going too fast she, Nevins, did not know all of the circumstances; that she reported this to higher management; and that even though the records may not reflect it, she kept management informed. Nevins further testified that she personally told Peggy Heiden before that the employees could keep building the parts on the trays when a machine was down.

Bialy testified that on March 17, 1999, during a break from an executive committee planning session meeting at about 9:30 a.m. he was told by Debi Stevens, the payroll coordinator, that she had just witnessed an incident that had occurred in human resources; that he spoke with Peggy Heiden during the break telling her that he wanted to talk with her when he had some time later; that during the next break, which occurred at about 1:30 p.m., he told Heiden that he would try to get back to her before she left work at 3:30 p.m. but if he could not he would telephone her at home that night; that he did not remember having any discussions with Nevins on March 17, 1999; that the planning session ended about 7:30 p.m. and he telephoned Heiden from his car on the way home; that when he telephoned Heiden he spoke with a deputy sheriff who was at her residence; that the deputy sheriff told him that he was "called to the house because there was a complaint filed about a potential assault at the plant that afternoon by Peggy Heiden's supervisor against Peggy" (Tr. 1141 and 1142); that the Deputy "indicated that there was a complaint about an assault. He talked about there was maybe some pushing that had taken place and I could not confirm that I had any—that I had no knowledge of any of that happening" (Tr. 1143 and 1144); that he did not talk with Nevins the evening of March 17, 1999; that on the morning of March 18, 1999, he told Lefief, who he spoke to at the meeting the day before, of the latest development in the Nevins-Heiden incident, namely that Heiden "had filed a complaint with the Sheriff and alleged an assault by Sherry Nevins against Peggy" (Tr. 1146) (While Heiden telephoned the sheriff's department regarding a complaint she had, she never filed a charge.); that he and Lefief "began to talk about what our game plan was. What our action plan was going to be" (Tr. 1146); that he and LeFief told Ikenaga that there "could be a criminal investigation and that there could be some charges that were going to be investigated by the police department and that we needed to take this very seriously" (Tr. 1147); that he and LeFief spoke to Heiden and Nevins and both of them were suspended with pay pending an investigation; that during the March 18, 1999 meetings Heiden told them that on March 17, 1999, Nevins was unhappy over some decisions made on the floor relating to the assignment of a temporary employee, and in their subsequent meeting in human resources Nevins touched her on the shoulder twice "very lightly" (Tr. 1149); that Heiden told them that she had called the police when Bialy did not call her because she was scared, and she was sorry that she called the police, but she felt that she needed to do that; that he did not remember Heiden indicating that there was a withdrawn complaint or a pending complaint, "I was operating under the assumption that she had called the police and a complaint had been filed" (Tr. 1149); that Heiden did not "say anything that refuted that assumption" (Tr. 1150) (Since Bialy did not tell Heiden what he was assuming, and since Heiden did not tell him anything that would have reasonably warranted his mistaken conclusion, it is not clear how she would have appreciated that she should "be refuting that [an unwarranted] assumption."); that Lefief told Heiden that she was suspended with pay pending an investigation; that after a short break he and Lefief interviewed Nevins; that they told Nevins that a police complaint had been filed and she was alleged to have assaulted Peggy Heiden; that he did not

recall telephoning Nevins the night before to tell her this but he may have; and that Nevins told them, that she had gone out on the floor and noticed that a temporary employee that she had assigned to the assembly area had been moved. She was upset by that. She indicated that she wanted him to be there because he needed to complete his training and the line would not operate properly without the correct number of people, and she got angry and she went over and—and moved him back to the line and had words with Peggy on that issue.

> She indicated that those words got more heated and that it led to her getting very concerned about what she considered to be behavior that was disrespectful, maybe an insubordinate on Peggy's part and asked Peggy if she could—would join her up in the HR office.
>
> Sherry indicted that she was angry. That she was frustrated. That the tone of her voice was loud and that she did, in fact, invite or order, if you will, Peggy to go up to the HR office to have a conversation with her about that. I asked her how that conversation went. She did say that Peggy asked that I be there. She said that she told Peggy that I did not need to be there because they could solve the problems between the two of them. I asked her if there was any physical contact between the two of them. Sherry denied that there was any contact. I asked her where she was standing. She said she was standing near by door with her hand actually on my door. I asked her if she was blocking the door. She said she didn't think so, but that . . . she was over by the door and holding the door. And I again asked her if there was any physical contact between the two of them and she said no, there was no physical contact. [Tr. 1151 and 1152.]

Bialy further testified that he interviewed Brodie, Ole, and Stevens one-on-one; that he and Lefief decided that because of his relationship with Brodie and Stevens was fairly close it would be best to have an independent person verify the facts; that they asked their attorney, Shelly Coe, to come in the next day and interview Brodie, Ole, and Stevens; that it was decided that he and Coe would interview Brodie, Ole, and Stevens the next day; that he was present the next day for the three interviews; that on Saturday, March 20, 1998, Tammy Clark spoke to him and she signed a statement; that he also talked with Sue Barnier, Laura Iott, and Ron Bauer; that "Tammy [Clark] indicated to me that Sherry had said at least on two occasions in her presence—I'm sorry, Peggy had said on at least two occasions in her presence that she was out to get Peggy [As noted above, the two individuals who were involved in the confrontation are Peggy Heiden and Sherry Nevins.]. Out to fire Peggy. (Again as noted above, the two individuals who were involved in this confrontation are Peggy Heiden and Sherry Nevins.) Do whatever she could to make that happen. And that concerned me because I thought that that could possibly be a motive behind some of the actions that we were seeing at the time." (Tr. 1162) (This testimony was given after Clark, who testified that she did not have any reason to stop and speak to Bialy in March 1999, belatedly testified about a second instance of Peggy Heiden stating that she wanted to get Nevins fired, and then testified that she could not remember if she told Nevins about this earlier Heiden statement.); that with respect to the bullets on General Counsel's Exhibit 14, he had never seen Peggy Heiden slowing down work; and that when he and Lefief subsequently met with Peggy Heiden, LeFief went through the bullets on General Counsel's Exhibit fairly quickly. On cross-examination, Bialy testified that Brodie was the human resources coordinator, Stevens was the payroll coordinator, and Terry Ole is a supervisor; that Stevens is not a supervisor; that on March 17, Iott and Bauer would have been 50 to 75 feet from where Peggy Heiden was working; that he did not request that the employees who were working with Peggy Heiden on March 17 give statements; that he knew that Iott and Bauer did not support the Union; that Coe had been hired by the Respondent to help the Company respond to the union organizing drive and there was to be an election in April 1999; that he never asked Peggy Clebos or Janet Hatcher if Peggy Heiden was involved in an effort to try to get rid of her supervisor; that Heiden was never given a chance to respond to this allegation before she was given her final warning; that while he had Stevens review her statement, General Counsel's Exhibit 43, regarding what allegedly occurred on March 17, 1999, between Nevins and Peggy Heiden in his office, he "just didn't" ask her to sign the statement; that Stevens' wrote on the typed statement that Nevins was holding the door so that Peggy Heiden could not get out; that the statement then indicates that at no time did Stevens see Nevins touch Heiden; that the statement then indicates that not long after the incident Peggy Heiden told Stevens that Nevins pushed her; that Stevens indicated that she did not see all of what went on in Bialy's office between Nevins and Heiden; that Brodie indicated that she did not see the whole incident; that he was not sure whether Peggy Heiden on her own told the temporary to go away; that he was told by Nevins that Peggy Heiden told the temporary to move on, that Peggy Heiden had reassigned the temporary; that it was his understanding that at some point in time Peggy Heiden reassigned the temporary to another job; that Peggy Heiden reassigned the temporary employee from the job on the assembly line to another job; that he did not know how Peggy Heiden accomplished this; that he did not believe that Nevins told him that she heard Peggy Heiden tell the temporary employee to go to another job; that it was his understanding that when Peggy Heiden was paging Nathan Iott the reassignment of the temporary employee had occurred already and there was going to be yet another discussion about where the temporary employee was going to be assigned; that Nathah Iott was a supervisor or a team leader in the Potting area and he was helping in the assembly group because Nevins was not at her desk in that area and she was spending substantial periods of time in the Human Resource office doing other things; that it was his understanding that Peggy Heiden had already sent the temporary employee someplace and she was paging Nathan Iott to tell him where she had sent the temporary employee; that when Nevins went back on the floor the temporary was supposed to be there and he was not; that Nevins moved the temporary back to the line; that when Peggy Heiden paged Nathan Iott she did not again move the temporary employee but it was his understanding that the prior move was pursuant to the instructions of Heiden; that he did not know whether Peggy Heiden contacted Burnett or

Nathan Iott about the previous move; that he really did not know if Peggy Heiden on March 17, 1999, on her own initiative, without contacting supervision, reassigned an employee; that if any reassignment of the temporary was done properly by someone in supervision it is possible that he might view Nevin's conduct in a different light; that Terry Ole gave a signed written statement and while she was asked if she had witnessed the Nevins and Peggy Heiden incident, Ole did not include what happened in her statement; that he did not know why Ole was asked what happened but she never put it in her statement; that with respect to the bullet on General Counsel's Exhibit 14 alleging that Peggy Heiden encouraged other employees to slow down their work, he never personally observed her doing that, he never accused her of deliberately slowing down work or causing others to slow down work, he did not know when the incident was supposed to have taken place, that such conduct would be a very serious offense, but he did not know that an employee should be given an opportunity to respond to such an allegation; that Nevins told him that Peggy Heiden had told temporaries that they should slow down and they should not work at the pace that they were working at; that with respect to the bullet regarding refusing to perform tasks assigned to her, that could be considered insubordination and yet no discipline was issued to Peggy Heiden at the time of the alleged infraction; that Peggy Heiden was not given notice of this allegation and she was not given the opportunity to give her side of the story; that the only time he was aware that Lefief talked to Peggy Heiden about the allegation of insubordination was at the final warning meeting, and at that time the decision had already been made to administer the final warning; that the sheriff's deputy never told him that a formal complaint had been filed; that the Company did not ascertain whether a police report had been filed regarding the incident; and that he did not talk to Nathan Iott about the March 17, 1999, Nevins and Peggy Heiden incident but he believed that Lefief did. On redirect Bialy testified that about March 30, 1999, after he telephoned him, the involved deputy sheriff stopped at the plant and told him that there were no charges filed; that this was new news to him; and that the final warning to Peggy Heiden is a valid warning and it would still be a valid warning whether or not Peggy Heiden reassigned the temporary employee on March 17, 1999.

Also on March 24, 1999, Nevins met with Bialy and Lefief and was given a written warning, Respondent's Exhibit 11, for letting the situation get out of control, for not having someone present with her and for being too loud. Nevins also testified that she did not have any role in preparing Respondent's Exhibit 14.

On March 26, 1999, Peggy Heiden was allowed to and did examine her personnel file. She testified that she found no support in her personnel file for the laundry list of allegations against her in the above-described March 23, 1999 final warning.

The General Counsel introduced General Counsel's Exhibits 12(a), (b), (c), (d), and (e), which, respectively, are a May 28, 1999 written warning to employee Chad Naugle concerning mold maintenance and the damage he caused when he got careless (The warning refers to at least four molds in the last four months that have been damaged or caused scrap parts that was a direct result of Naugle working on them.), a "5/28/99" discipline record form involving the forth Naugle incident, an "11/30/99" discipline record form (oral warning) to employee Nellie Shaw for failing to detect a defect which resulted in 34 pieces of scrap, the "INCIDENT REPORT" involving Shaw's November 30, 1999 incident, and a "12–3–99" discipline record form (oral warning) to Dave Lucie for failing to notice 24 parts that had broken tabs or the tabs were bent to the point where the parts were not usable.

Analysis

Paragraph 8 of the complaint alleges that about July 30, 1998, Respondent, by its agent Shige Ikenaga, at its Dundee facility indicated to employees that it would be futile to elect the Charging Party as their representative by telling them that it would not continue to operate the Dundee facility if they chose to be represented by the Charging Party. Counsel for the General Counsel on brief contends that by telling employees that he could not work with the Union, there would be no future for the plant with the Union, and that he would close the doors, the Respondent's highest official was indicating to the employees that selecting a bargaining representative would be futile and the plant would close; and that this conduct violated Secton 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Douglas Foods Corp.*, 330 NLRB 821 (2000); *ITT Automotive*, 324 NLRB 609, 622 (1997), enfd. in part 188 F.3d 375 (6th Cir. 1999). The Charging Party on brief argues that Ikenaga did not credibly deny the testimony of the General Counsel's witnesses with respect to what he said on July 30, 1998. The Respondent on brief contends that only two of the General Counsel's witnesses testified regarding Ikenaga's statements on July 30, 1998, and they testified inconsistently with each other; that while Hatcher testified that Ikenaga started the meeting by saying that he heard rumors of Union coming and he said that if the Union came, he would have to close the doors, Peggy Heiden testified that Ikenaga said that he had heard that there was a very strong union organizing going on in the plant, he could not work with the Union, and there would be no future for the plant with a union; that Heiden made no mention of the plant closing threat described by Hatcher; and that Ikenaga's account was fully supported by the other company witnesses who were present at the meeting and testified at the trial herein, namely Nevins and Hill. With respect to Hatcher's allegation that Ikenaga said that he would close the doors, it is not corroborated by anyone. And with respect to Peggy Heiden's allegation that Ikenaga said that he could not work with the Union, and there would be no future for the plant it too is not corroborated by anyone. When Ikenaga testified at the trial herein he used an interpreter. It was not shown that an interpreter was present when he spoke at the employee meeting on July 30, 1998. It appears, however, that Ikenaga speaks and understands English. And Nevins, for the reasons given below, is not a credible witness. But Ikenaga's denials were also corroborated by Hill. No showing was made which would warrant a finding that Ikenaga and Hill are not a credible witnesses. In these circumstances, I find that the General Counsel has not met his burden of demonstrating by a preponderance of the

evidence that the alleged unlawful statements were made. It appears that Hatcher and Heiden read into Ikenaga's speech something that was not explicitly stated.

Paragraph 9(a) of the complaint alleges that the Respondent, by its agent Sherry Nevins, at its Dundee facility, about August 1, 1998, (1) coercively interrogated employees on two occasions about their activities on behalf of and in support of the Charging Party, and (2) threatened employees on three occasions with loss of employment if they chose to be represented by a labor organization. The General Counsel on brief contends that the credible testimony of Peggy Heiden, who was on the VOC, established that she was coercively interrogated with respect to her support for the Union, she was "told in so many words" (GC Br. 5) that the plant would close if the union drive was successful, and the owners would not work with the Union; that an employer cannot question an open union supporter when it is done in the context of unlawful threats of reprisals or is otherwise coercive, *Naomi Knitting Plant*, 328 NLRB 1279 (1999); and that Nevins' persistent questioning of Matt Heiden, who wore union hat and button, with the implicit threat of plant closure ("What are you going to do if the plant closes?") was a coercive interrogation in violation of the Act, and the threat of plant closure was a separate violation of the Act. The Charging Party on brief argues that Nevins considered the interrogation of employees as being part of her job. The Respondent, on brief, contends that no one corroborates Peggy Heiden regarding these allegations; that this is part of Peggy Heiden's effort to get rid of Nevins; that at one time Peggy Heiden and Nevins were friends; and that while they were still speaking on a friend-to-friend level, such conversations would not have been coercive under the rationale of *Rossmore House Hotel*, 269 NLRB 1176 (1984), affd sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Nevins was not a credible witness. As found below, she lied under oath with respect to what occurred on March 17, 1999, in Bialy's office with Peggy Heiden. Nevins held the door and kept Peggy Heiden in Bialy's office against her will until she realized that there were witnesses to what was going on and Peggy Heiden was getting those witnesses involved in the incident. The March 17, 1999 incident also showed that Nevins either did not know or would not accept just how far she could go in a situation. Also as found below, Nevins engaged in unlawful interrogation on other occasions. Peggy Heiden's testimony is credited. It might be argued that because Peggy Heiden's testimony about what Ikenaga allegedly said on July 30, 1998, was not relied on, her testimony about the conduct which is the subject of these allegations in the complaint cannot be relied on. However, as pointed out by Chief Judge Hand in *NLRB v. Universal Camera Corp.*, 179 F.2d 749 at 754 (2d Cir. 1950), that "[i]t is no reason for refusing to accept everything that a witness says, because you do not believe al of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." The same applies to Ikenaga's testimony regarding what he said to he employees on July 30, 1998. I do not believe Ikenaga's testimony about the Hatcher transfer. Nonetheless, I have credited his denials regarding his alleged unlawful statements to employees on July 30, 1998. With the commencement of the Union drive, the relationship between Peggy Heiden and Nevins changed. And as far as Peggy Heiden being an active union supporter, Nevins acted unlawfully in including threats with her interrogation. That made the interrogation of Peggy Heiden unlawful, and similarly by including a threat, namely that the Japanese would not allow the Union, Nevins also made her interrogation of Matthew Heiden unlawful. With respect to the allegation in paragraph 9(a)(2) of the complaint, Nevins acted unlawfully only once when she told Peggy Heiden "when the plant closed down." Her statement to Matthew Heiden, in the presence of Peggy Heiden, namely "if the plant closes" because "the Company could lose the Chrysler business," was not a prediction or a threat but merely the statement of a possibility. To reiterate, the Respondent violated the Act on two occasions as alleged in paragraph 9(a)(1) of the complaint, and it violated the Act on only one occasion in the manner alleged in paragraph 9(a)(2) of the complaint.

Paragraph 9(b) of the complaint alleges that about August 8, 1998, Nevins threatened employees with unspecified reprisals if they chose to be represented by a labor organization. On brief the General Counsel contends that Nevins' statement, namely that her feelings were hurt by the newsletter the employees who were the organizers for the Union published and if the employees wanted a fight, "then you've got it," threatened employees with unspecified reprisals if they chose to be represented by a labor organization. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 492, 494 (1955), enfd. in part, denied in part 97 F.3d 65 (4th Cir. 1996); *Yerger Trucking*, 307 NLRB 567, 570 (1992). The testimony of Peggy Heiden is credited. Nevins denied making the statement. But as indicated above, Nevins was not a credible witness and she either did not know or did not care how far she could go with the employees. The statement viz. if the employees wanted a fight then you've got it, was made. The question now is was it an unlawful statement. While this was a conversation with one employee and in a manufacturing plant it could be expected that there would be a certain amount of give and take during an organizing campaign, what Nevins said must be viewed both in the full context of the statement and in the context of her past conduct with this employee. Days before this Nevins threatened Peggy Heiden with loss of employment "when the plant closes." And Nevins, in making her you have a fight statement, referred to the fact that her feelings were hurt by the newsletter the employees who were the organizers for the Union published. It was not shown that the newsletter in question in any way disparaged Nevins personally. Publishing and distributing the newsletter was not shown to be anything other than lawful. So, in effect, Nevins was telling an employee who she had already threatened with plant closure just days earlier that the employees would have a fight because the employees lawfully published a newsletter. When considered in this context, Nevins statement was a threat of an unspecified reprisal. The Respondent violated the Act as alleged in this paragraph of the complaint.

Paragraph 9(c) of the complaint alleges that about August 10, 1998, Nevins (1) coercively interrogated employees about their activities on behalf of and in support of the Charging Party, (2) created the impression among its employees that their activities on behalf of and in support of the Charging Party were under surveillance, by telling employees it was watching

them, and (3) orally promulgated a new work rule prohibiting employees from congregating and leaving their assigned departments. On brief, the General Counsel contends that even though Peggy Heiden was an open union supporter, Nevins did not have the right to insist that Heiden discuss her feelings about the Union and attempt to force her to discuss her sympathies by threatening to write her up for insubordination if she continued to refuse; that the interrogation was coercive and violated Section 8(a)(1) of the Act; that Nevins comment to Peggy Heiden that she was told to watch the organizer created the impression that the organizers' union activities would be under surveillance and therefore Nevins violated Section 8(a)(1) of the Act; and that prohibiting the organizers from leaving their department and congregating at the end of the shift when production had been completed, when other employees were allowed to do so, also violated Section 8(a)(1) of the Act. Peggy Heiden's above-described testimony about what occurred in the cafeteria and later that day when she went to the testing department to speak with Coffey is credited. Nevins was not a credible witness. And Seivert did not deny Peggy Heiden's testimony regarding what he witnessed in the cafeteria that day. In addition to not being creditable, Nevins assertion that she would not have said that she was supposed to watch union organizers is not an unequivocal denial. For the reasons specified by the General Counsel, the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 9(c)(1), (2), and (3).

Paragraph 9(d) of the complaint alleges that during late August or early September 1998, Nevins created the impression among employees that their activities on behalf of and in support of the Charging Party were under surveillance by escorting employees while walking through its facility. No evidence was introduced regarding this allegation and it will, therefore, be dismissed.

Paragraph 9(e) of the complaint alleges that about September 4, 1998, Nevins (1) coercively interrogated employees about their activities in behalf of and in support of the Charging Party, (2) threatened employees with loss of employment should a union be elected as the employees' representative, (3) orally promulgated an overly broad work rule that prohibited employees from talking to one another about the Charging Party during working hours, and (4) questioned employees' loyalty to it because they engaged in activities on behalf of and in support of the Charging Party. The General Counsel on brief contends that Nevins again coercively questioned Peggy Heiden about her union activities when she asked Heiden on September 4, 1998, if she was trying to organize the temporaries; that the questioning was not done in a casual manner in that it occurred in the human resources offices with the manager of that department present; that Nevins, by telling Peggy Heiden that she could not talk about the Union during working hours, promulgated an overly broad no-solicitation rule, *Wellstream Corp.*, 313 NLRB 698, 702–703 (1994), and *Ichikoh Mfg.*, 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994); and that the Respondent in both instances, violated Section 8(a)(1) of the Act. Peggy Heiden's testimony as described above is credited. Nevins was not a credible witness. And the Respondent did not call Seivert to testify. For the reasons specified by the General Counsel, the Respondent violated Section 8(a)(1) of the Act as specified in paragraphs 9(e)(1) and (3). No evidence was introduced with respect to paragraphs 9(e)(2) and (4).

Paragraph 9(f) of the complaint alleges that about December 1998 the Respondent through Nevins (1) coercively interrogated an employee as to his/her union sympathies, on behalf of the Charging Party, (2) created the impression among its employees that their activities on behalf of and in support of the Charging Party were under surveillance by telling them that she had heard through the grapevine of certain union bargaining demands, and (3) impliedly threatened its employees with loss of employment if they voted in the Charging Party as their collective bargaining representative. The General Counsel on brief contends that by telling Bomia that she "heard through the grapevine" conveyed the impression that the Respondent was engaged in surveillance of the employees' union activities; that Nevins' statement that if the employees got $15 an hour, the Company would have to raise its prices on ignition coils, and if the Company did that Chrysler would go to a different supplier was not based on any objective prognostication, and was clearly an implied threat that in the event the employees unionized, the plant would lose its primary customer and would close; and that the statements to Bomia violated Section 8(a)(1) of the Act in both respects. *NLRB v. Gissel Packing Co.*, supra; *Debber Electric*, 313 NLRB 1095, 1097 (1994); and *Dlubak Corp.*, 307 NLRB1138, 1153 (1992), enfd. 5 F.3d 1489 (3d Cir. 1993). The Respondent on brief argues that Bomia's testimony on this subject does not state an 8(a)(1) violation; that Nevin's account of this conversation is far more complete and plausible; and that Nevins' statements were protected by Section 8(c) of the Act and there is nothing improper about such a factual prediction regarding a customer's economic motives. *DTR Industries, Inc. v. NLRB*, 39 F.3d 106, 114 (6th Cir. 1994). Bomia's above-described testimony is credited. Nevins was not a credible witness. Nonetheless, contrary to the contention of the General Counsel, I do not believe that Nevins conveyed the impression that the Respondent was engaged in surveillance of the employees' union activities by saying that she "heard through the grapevine." During a union organizing drive in a manufacturing plant of the size of the one involved here undoubtedly all kinds or rumors are circulated. Nevins' phrasing indicated no more than she heard something unofficially. I believe that it is too much of a stretch to conclude that "heard through the grapevine" could reasonable be understood to mean that the Respondent engaged in surveillance of the employees' union activities. Also, I believe that it is a stretch to conclude that Nevins' statement meant that the plant was going to close. Nevins said that the Company would have to raise prices to pay everybody $15 an hour, and if the Company raised prices on ignition coils, then Chrysler would go to a different company. It is a well-known fact of economic life that if a producer raises the price of its product, the purchaser, if he can get the same or a similar product elsewhere, reassess whether he wants to pay the higher price or purchase the product from another producer. Nevins is a low-level supervisor. What she was saying was nothing more than a reasonable observation. Neither during this conversation, nor during any other conversation with

Bomia, did Nevins explicitly or implicitly indicate that the plant was going to close or that employees would lose employment. No evidence was introduced with respect to the allegation in paragraph 9(f)(1). Consequently, it has not been shown that the Respondent violated the Act as alleged in paragraph 9(f) of the complaint.

Paragraph 9(g) of the complaint alleges that the Respondent through Nevins about March 1999 (1) coercively interrogated an employee as to his/her union sympathies, (2) created the impression among its employees that their activities on behalf of and in support of the Charging Party were under surveillance by implying to them that she had heard they had been approached to vote for the Charging Party, and (3) impliedly threatened its employees with loss of employment if they voted in a labor organization. The General Counsel on brief contends that Nevins' questioning of Ryan Clark and two temporary employees about whether anyone had bothered them about voting for the Union constituted coercive interrogation in violation of Section 8(a)(1) of the Act; that this questioning also implied that their union activities were under surveillance and accordingly violated the Act; and that the statement that the Respondent would not tolerate such conduct was a veiled threat of reprisals in the event the employees opted for union representation, and was another violation of the Act. The above-described testimony of Clark is credited. Nevins was not a credible witness and her testimony that she did not have the above-described conversation with Clark is not credited. The complaint allegation is that Nevins coercively interrogated an employee "as to his/her union sympathies." Nevins asked Clark and the two temporary employees present "if anyone had been bothering . . . [them] about voting for the union." In other words, Nevins was not asking about their union sympathies. Nevins was asking about the union activities of the person or persons who might have talked to them about voting for the Union. Such an inquiry would not be covered under this allegation, and the General Counsel did not amend the allegation. The second allegation in this paragraph indicates that Nevins implied to Clark and the other two temporary employees present that "she had heard they had been approached to vote for the Charging Party." Nothing in Clark's testimony supports this assertion. Nevins said nothing which would imply to a reasonable person that "she had heard they had been approached to vote for the Charging Party." Nevins asked if they had been approached or more specifically "bothered." That was it. There was nothing more. And her subsequent statement that the Respondent would not tolerate anyone bothering them to vote for the Union did not change this. Was Nevins, in saying that the Respondent would not tolerate anyone bothering them to vote for the Union, impliedly threatening the Respondent's employees with loss of employment if they voted in a labor organization? As noted above, on brief the General Counsel argues that it was a veiled threat of reprisal. But that is not what the complaint alleges, and the General Counsel did not move to amend the complaint. The Respondent did not violate the Act as alleged in paragraph 9(g) of the complaint.

Paragraph 10 of the complaint alleges that about August 1998, Respondent, by its agent Mardi Reid, at its Dundee facility, created the impression among its employees that their activities on behalf of and in support of the Charging Party were under surveillance by telling them they were wandering in the plant, talking to unauthorized persons and over staying their breaks. The Respondent on brief contends that Carter, who had worked in a UAW shop for 20 years before joining the Respondent, was an open union supporter after the campaign was underway; that Carter had friendly relationships with both Reid and Folmar, his supervisor and manager, respectively; that on cross-examination Carter was careful to couch his testimony regarding any prior similar conversations in terms of "I don't remember those," he was "pretty sure that's the first time"; that Carter acknowledged that Reid's comments may well have been grounded in fact; and that this was a friendly and comfortable conversation between a supervisor and a self-identified union supporter and it did not violate Section 8(a)(1) of the Act. Carter answered questions on cross-examination the way he did because the Respondent's attorney asked "do you have specific recollection," "do you remember," "you don't remember," and "[c]an you be sure." And with respect to the Respondent's assertion that Carter conceded that Reid's comments may well have had some basis in fact, it is noted that Carter denied wandering the floors, and while he testified that he did take a moment or two to talk to people, he did not acknowledge that they were people that he would not normally be talking to. This conversation occurred in late August 1998. Just weeks later, Folmar asked Carter if he was a union organizer, told Carter that he had heard that he was put in the plant to organize the employees, asked Carter if he had been "salted," and asked Carter about a union negotiation procedure. Folmer did not testify so Carter's testimony about that conversation is not denied. The Respondent viewed Carter as an organizer. His testimony regarding his conversation with Reid is credited. Reid's testimony about this conversation is not credited. This was not a friendly conversation. Reid was warning Carter. He was viewed as an organizer and the conduct Reid focused on was the conduct that someone who was organizing might engage in, namely talking to other employees about the Union whenever he had the chance. Reid was telling Carter that his activities, which may be those of an organizer, were being watched. The Respondent violated that Act as alleged in paragraph 10 of the complaint.

Paragraph 11 of the complaint alleges that about September 1998, the Respondent, by its agent, Jerry Folmer, at its Dundee facility, (a) coercively interrogated employees on two occasions about their union activities on behalf of and in support of the Charging Party, and (b) created the impression among its employees that their activities on behalf of and in support of the Charging Party were under surveillance by telling them it had heard from a supervisor that they were "salts." The General Counsel on brief contends that Folmer created the impression of surveillance of union activities by telling Carter that he had heard that Carter had been placed in the plant by the UAW as a "salt"; that Folmer coercively interrogated Carter regarding such activities; and that these were both violations of Section 8(a)(1) of the Act, *Athens Disposal Co.*, 315 NLRB 87, 98 (1944). The Respondent argues that Carter's conversation with Folmer was entirely nonthreatening and noncoercive. As noted above, Folmer did not testify and so Carter's testimony is not

denied. This was not a friendly conversation between a member of management and an employee who supported the Union. Folmer accused Carter of being a union organizer and being placed in the plant by the UAW as a "salt." Folmer put Carter on the defense, requiring him to deny this and to respond to a question about union procedure. Folmer's inquires were coercive. They were made in the context of other unlawful conduct. Also, Folmer created the impression that Carter's activities on behalf of and in support of the Union were under surveillance. The Respondent violated the Act as alleged in paragraph 11 of the complaint.

Paragraph 12 of the complaint alleges that about September 24, 1998, the Respondent, by its agents, Gary Seivert and Steve Hill, at its Dundee facility engaged in surveillance of employees' activities on behalf of and in support of the Charging Party. The General Counsel on brief contends that voting is confidential and engaging in surveillance of employees' voting activities violated Section 8(a)(1) of the Act, *ITT Automotive*, 324 NLRB 609 (1997). The Respondent on brief argues that Ruez was mistaken as to the time or place and she was not corroborated; and that even if Ruez were believed, the presence of managers near the polling place under the circumstances she described, may well be a proper objection but not surveillance constituting an unfair labor practice. In the only case cited by the General Counsel on this point, *ITT Automotive*, supra, the administrative law judge found that the "continued presence" of a management person at a location where the employees were required to pass in order to enter the polling area, as well as from where management observed the employees whole waiting at the top of the stairs and on the balcony outside the door to the polling place, did interfere with the employees' freedom of choice in the election, and, therefore, he sustained the union's objection. Ruez testified that she only saw Hill and Seivert on her way into the polling place and they were not there when she left the polling place. In these circumstances, I do not believe that it can even be concluded that management had a continued presence in the area. The General Counsel has not shown that the Respondent violated the Act as alleged in paragraph 12 of the complaint.

Paragraph 13 of the complaint alleges that about September 10, 1998, the Respondent, by its agent, Don Lynch, at its Dundee facility, harassed is employees by telling them that their coworkers had raised concerns about their work performance, then later telling them that it would not charge them with these offenses because of lack of documentation. On brief, the General Counsel contends that Lynch's statements to Hatcher that she was "headed down the wrong path" and he was keeping her "out of harms way" were thinly veiled references to her union activity; that the Respondent was trying to isolate her in the critical period before the election; that the evidence of anti-union animus and disparate treatment, and the admissions by Lynch that Respondent had no legitimate basis for transferring Hatcher, proves this transfer was designed to discourage her union activities; and that, therefore, the Respondent violated Section 8(a)(1) of the Act. The Respondent on brief argues that statements made to Hatcher by Nevins, Lynch, and Ikenaga were entirely legitimate—although somewhat cryptic so as to not antagonize the interpersonal situation with coworkers; that Hatcher's subsequent transfers back and forth between the departments were likewise legitimate to balance staffing needs and meet production requirements; that none of this involved an adverse impact on Hatcher; and that there is no evidence connecting the treatment of Hatcher to her union activity. Hatcher's testimony regarding this matter is credited. Neither Iott nor Bauer testified so we do not know firsthand what, if any production problem existed. Lynch did not testify so we do not have firsthand his justification for the statements he made. Nevins testified but as noted above she was not a credible witness and I would not rely on her testimony unless it was corroborated by a reliable witness or reliable documentary evidence. Nevins was not corroborated regarding Hatcher's production. Ikenaga was not relying on personal observations and his testimony regarding the reason for the transfer, namely that Iott and Bauer complained that Hatcher "is slow or quality problem and sometimes she go out, often she go out from the working place," begs to have Laura Iott and Bauer testify to explain what they perceived the problem to be. And if what Lynch told Hatcher is true, there are no documents which would show that her production was wanting. On brief, the Respondent concedes that Lynch's statements were somewhat cryptic. Yet the Respondent did not call Lynch as a witness. In the circumstances extant here, I believe that the General Counsel's conclusions about the situation are correct. The Respondent violated the Act as alleged in paragraph 13 of the complaint.

Paragraph 14 of the complaint alleges that the Respondent, by its agent, Tanya Brodie, at its Dundee facility (a) on September 28, 1998, and in mid- to late October 1998 coercively interrogated an employee as to his/her support for and sympathies on behalf of the Charging Party, and (b) about March 1999, coercively interrogated an employee as to his/her union sympathies. The General Counsel on brief points out that neither Brodie nor Burnett were ever called as witnesses by the Respondent to rebut these allegations; and that questioning job applicants about their union sympathies is a violation of Section 8(a)(1). *Ristorante Donatello*, 314 NLRB 693, 694 (1994). The Respondent on brief makes a number of arguments none of which explains why the Respondent did not call Brodie as a witness to deny this unlawful conduct, if indeed she did not engage in it. In these circumstances, the testimony of General Counsel's witnesses, which is not refuted by Brodie, is credited. The Respondent violated the Act as alleged in paragraph 14(a) of the complaint. No evidence was introduced regarding paragraph 14(b) of the complaint.

Paragraph 15 of the complaint alleges that since August 3, 1998, the Respondent has maintained an overly broad no-solicitation rule at its Dundee facility, which provides:

> We recognize that team members may have interests in events and organizations outside the workplace. However, team members may not solicit or distribute literature concerning these activities during working time or in working areas.

The General Counsel on brief contends that absent special circumstances, not present her, the Board has long held that an employer is not free to prohibit solicitation in working areas during nonworktime, and accordingly the involved rule violated

Section 8(a)(1) of the Act. *Stoddard-Quirk Mfg.* Co., 138 NLRB 615, 621 (1962). The Respondent on brief argues that in connection with the settlement of the first complaint, and without admitting a violation, the Respondent agreed to rescind the old rule in the Respondent's November 1997 employee handbook, General Counsel's Exhibit 9, and to substitute a new rule which was effective February 1999, General Counsel's Exhibit 11; that the old rule explained that working time did not include lunch periods, or any other periods in which team members are not on duty; that no evidence was presented that the old rule was applied to anyone; that if it is the General Counsel's position that the old rule did not explain an employee's right to solicit (as opposed to distribute) during the employees nonworking time in a working area, the plant runs continuously 24 hours a day and so the General Counsel's distinction is moot; and that the General Counsel's apparent theory regarding the old rule is so attenuated and de minimis, even if the words were deemed ambiguous, that it cannot be said to violate the Act. The rule in question is unlawful in that it is overly broad. It does not matter that the plant might run 24 hours a day. The rule as promulgated prohibits solicitation between nonworking time employees in actual working areas. Such a prohibition has been found to be presumptively invalid even in health care cases when the work areas involved are not immediate patient care areas. *Cooper Health System*, 327 NLRB 1159, 1163 (1999), and *Health Care & Retirement Corp.*, 310 NLRB 1002, 1005 (1993). As the Board indicated in *Stoddard-Quiirk Mfg. Co.*, supra at 621:

> [W]e believe that to effectuate organizational rights through the medium of oral solicitation the right of employees to solicit on plant premises must be afforded subject only to the restriction that it be on nonworking time.

The fact that the Respondent changed the rule in February 1999, well after the involved organizing drive, does not warrant dismissing the allegation in paragraph 15 of the complaint. The Respondent violated the Act as alleged in paragraph 15 of the complaint.

Paragraph 16 of the complaint alleges that about August 1998, the Respondent, by its agent, Joe Bitz, at its Dundee facility, changed the breaktimes of employee Shannon Ruetz. The General Counsel on brief contends that the Respondent was concerned that the union supporters would attempt to organize the temporary employees; that Ruetz talked to coworkers about the Union during lunch and breaks and wore union insignia at work; that requiring union activist Ruetz to take her breaks and lunch by herself shortly after she declared her support for the Union was an obvious effort to segregate her from he co-workers during her breaks and lunch in order to minimize her effectiveness in organizing support for the union among her co-workers; and that the isolation of Ruetz, because of her union activities, violated Section 8(a)(1) of the Act, *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995), enfd. in part, denied in part 97 F.3d 65 (4th Cir. 1996); and *Heartland of Lansing Nursing Home*, 307 NLRB 152, 163–164 (1992). The Charging Party on brief point out that the machines had run during breaks and lunch only "on occasions" prior to the July 30, 1998 "march on management"; that Hill testified that the employees would have gone on some type of alternating break; and that in testing only prounion Ruetz was required to take breaks alone. The Respondent on brief argues that Ruetz admitted on cross-examination that she was the most senior and experienced employee in the department, an experienced employee needs to be in the area while machines are running, and all the other people in the department were less skilled temporary agency workers; and that Nevins testified that other departments did the same thing that happened in Ruetz' department, namely, an especially skilled and senior employee would stay while other employees went on their break. Contrary to the Respondent's assertions on brief, Ruetz testified that some of the temporary employees did have the same skills she had, and Nevins testified that "usually . . . a trained operator . . . would stay helping out with . . . somebody who maybe just started, or . . . I could let the employees chose how they wanted to handle their breaks as long as the machines were covered." (Tr. 801.) Hill also testified that when the machine was run continuously there would be some type of alternating break so the machines could be kept running but he did not know the specifics on how the Ruetz situation was handled.

As set forth by the Board in *Flour Daniel, Inc.*, 304 NLRB 970 (1991):

> In *Wright Line*, 251 NLRB 1083, enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), [approved in *Transportation Management Corp.*, 462 U.S. 393 (1983)] the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Footnotes omitted.]

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, antiunion animus and adverse action taken against someone involved or suspected of involvement with the union, which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all of the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

The General Counsel has established that Ruetz engaged in union activity, with the wearing of union insignia at work the employer knew that she supported the Union, and the Respondent took an adverse action against Ruetz. The conduct of the Respondent found herein to be unlawful demonstrates signifi-

cant antiunion animus. Accordingly, the burden has shifted to the Respondent to demonstrate that the same action would have taken place notwithstanding the protected conduct. Again the Respondent did not call an employee's immediate supervisor to testify. Bitz was the one who told Ruetz that she would be taking breaks by herself and this approach was not changed for 3 or 4 weeks until Bitz was fired. Since some of Ruetz' coworkers had the same skills she did, the Respondent did not explain why it was necessary for Ruetz to go for 3 or 4 weeks without one of the other employees on even a single occasion alternating with her. The Respondent violated Section 8(a)(1) and (3) of the Act by changing the breaktime of Ruetz as alleged in paragraph 16 of the complaint.

Paragraph 17 of the complaint alleges that about September 8, 1998, the Respondent by its agent Sherry Nevins counseled employee Peggy Heiden pursuant to an overly broad rule described above in paragraph 9(e)(3) and memorialized this counseling in writing. The General Counsel on brief contends that the evidence of antiunion animus, much of which was specifically directed at Heiden, and the false reason given for the September 8, 1998 writeup to Heiden establishes that it was in retaliation for her union activity; and that this warning clearly violated Section 8(a)(1) and (3) of the Act, *Mediplex of Wethersfield*, 320 NLRB 510, 514 (1995). Heiden's testimony regarding what occurred on September 4 and 8, 1998, is credited. Nevins was not a credible witness. The testimony of Nevins is not credited. Once again the Respondent could have called a witness, Seivert, the former human resources manager, and it chose not to call him. He was present during the conversation between Nevins and Heiden on September 4, 1998, in the human resource office. On the one hand, Heiden unequivocally testified that, in the presence of Seivert, Nevins asked her if she was trying to organize the temporary employees, and Nevins told her that she was not supposed to talk about the Union during working hours. On the other hand, Nevins equivocally testified that she did not recall any discussion during the meeting about Heiden trying to organize the temps or talking to the temps or other employees about the Union, or that Heiden could not talk with the temps about the Union. Again, Seivert did not testify. Heiden's testimony is credited. Under *Wright Line*, supra, the General Counsel has demonstrated that Heiden engaged in union activity, the Respondent knew that Heiden engaged in union activity, there is significant antiunion animus on the part of the Respondent, and an adverse action was taken against Heiden. The Respondent has not met its burden of coming forward and demonstrating that the same action would have taken place notwithstanding the protected conduct. The Respondent violated Section 8(a)(1) and (3) of the Act as alleged in paragraph 17 of the complaint.

Paragraph 18 of the complaint alleges that about September 10, 1998, the Respondent, by its agent, Don Lynch, transferred employee Janice Hatcher to a new department. The General Counsel on brief contends that the evidence of antiunion animus and disparate treatment, and the admission by Lynch to Hatcher that the Respondent had no legitimate basis for transferring her, proves this transfer was designed to discourage her union activities; and that, accordingly, the Respondent violated Section 8(a)(1) and (3) of the Act, *Cannondale Corp*., 310 NLRB 845, 850–851 (1993). On brief, the Respondent argues that "[i]n early September 1998, because of their perceptions of Hatcher's inefficiency, Bauer and [Laura] Iott complained to Respondent's management, and Nevins got Plant Manager Don Lynch involved in the situation." (Tr. 807–810; R. Br. 29), that

> [b]ecause production employees work in teams, move around, and experience numerous external causes for production inefficiencies, Respondent has no statistical report or similar means of establishing an individual employee's personal speed or productivity in either the Assembly area or the Testing area. [Tr. 1046–1047, 1052.] [R. Br. 29.]

So allegedly we have Bauer and Laura Iott, who do not support the Union, making an accusation supposedly about production (Ikenaga testified "or quality"), the Respondent concedes on brief that there is no way to document this, Bauer and Laura Iott do not testify, Nevins is not a credible witness, Lynch does not testify, and Ikenaga testifies that his understanding comes from Lynch and his understanding is that Hatcher "is slow or quality problem and sometimes she go out, often she go out from the working place." Additionally, notwithstanding the fact that the Respondent now on brief describes Bauer's and Laura Iott's alleged complaints as being "their perceptions of Hatcher's inefficiency," Hatcher was never given the chance to defend herself if there were complaints about her production. Indeed Hatcher was not even given a reason for her transfer. Under *Wright Line*, supra, the General Counsel has demonstrated that Hatcher engaged in union activity, the Respondent knew that Hatcher engaged in union activity, there is significant antiunion animus on the part of the Respondent, and an adverse action (involuntary transfer) was taken against Hatcher. The Respondent has not met its burden of coming forward and demonstrating that the same action would have taken place notwithstanding the protected conduct. The Respondent violated Section 8(a)(1) and (3) of the Act as alleged in paragraph 18 of the complaint.

Paragraph 19 of the complaint alleges that about November 1998, and continuing to date, the Respondent by its agents, had engaged in general harassment of its employees Peggy Heiden and Janice Hatcher. The allegation in this paragraph will be treated under paragraph 21 below.

Paragraph 20 of the complaint alleges that about December 1998, the Respondent by its agents, Sherry Nevins and Steve Burnett, refused to assign overtime work to employees Peggy Heiden and Janice Hatcher. On Saturday, December 12, 1998, none of regular full-time employees was scheduled for overtime. Some temporary employees did some 100 percent inspection work on December 12, 1998. But this work was scheduled by the quality department without any knowledge or participation by Nevins or the management of the assembly department. In these circumstances, the allegation in this paragraph of the complaint will be dismissed.

Paragraph 21 of the complaint alleges that about November 1998, and continuing to date, the Respondent by its agent, Sherry Nevins, has harassed its employees Peggy Heiden and Janice Hatcher, by its discriminatory enforcement of its rules with respect to dress codes and safety glasses; assignment of work duties; monitoring of work, and more rigorous work and

conduct standards. The General Counsel on brief contends that the harassment of Heiden and Hatcher which began in August and September 1998, continued following the election; that the harassment in the form of disparate application of safety glasses policy and disparate assignment of onerous cleanup tasks, when examined in the context of the other blatant discrimination against these two union supporters, was clearly designed to punish them because of their continued support for the Union; and that in January 1999. (Since this occurred after November 1998 it appears that it is offered to show Nevins continuing intent.) Nevins told Heiden that the harassment would never stop. The Respondent on brief argues that none of the points raised by Heiden and Hatcher under the general harassment rubric involves discipline or adverse job action, and the generalized allegations in paragraphs 19 and 21 should therefore be dismissed. Lefief testified that both Heiden and Hatcher complained to him about being selected for especially onerous cleaning duties. When asked by the Respondent's counsel if he investigated the complaints Lefief testified, "[y]es . . . prior to . . . [his] coming to this Company . . . [there were problems because some] privileged people . . . [were not required] to do cleaning or . . . be responsible for their areas. And I made it my responsibility to insure that everyone did their share of work in the facility." (Tr. 605.) Lefief also testified that Heiden complained to him about being treated differently regarding the wearing of hairnets and being picked on for being away from her work area; and that Hatcher and Heiden were not treated differently by their supervisor. As noted above, Hatcher spoke to Herrmann about what she perceived to be harassment regarding the hair net policy and she was given a written warning. As noted below, Hatcher's testimony about that incident is credited in view of the fact that Nevins is not a credible witness and Herrmann did not testify at the trial herein. Herrmann's memorialization of the incident, General Counsel's Exhibit 8, does not change this. And both Heiden and Hatcher spoke to Nevins about what they perceived to be harassment. Hatcher testified that she quit the employees' the VOC at the end of December 1998 because she was tired of the company harassment. And subsequently when Heiden asked Nevins if she was ever going to stop the harassment Nevins told her that it would never stop. Heiden's testimony on this last point is credited. Nevins was not a credible witness. Contrary to his assertion, Lefief did not conduct any investigation of the harassment of Hatcher and Heiden. As described below, his testimony about Heiden's final warning demonstrated that he is not a credible witness. And as found above, Nevins admitted to Heiden, that the harassment was not going to stop. The Respondent was punishing Hatcher and Heiden for their union activity. The Respondent succeeded in getting Hatcher to give up her open union activity. Under *Wright Line*, supra, the General Counsel has demonstrated that Hatcher and Heiden engaged in union activity, the Respondent knew that they engaged in union activity, there is significant antiunion animus on the part of the Respondent, and adverse actions were taken against Hatcher and Heiden. The Respondent has not met its burden of coming forward and demonstrating that the same actions would have taken place notwithstanding the protected conduct. The Respondent violated Section 8(a)(1) and (3) of the Act as alleged in paragraphs 19 and 21 of the complaint.

Paragraph 22 of the complaint alleges that about November 5, 1998, the Respondent, by its agent, J. W. Herrmann, issued a written reprimand and final warning to employee Janice Hatcher. The General Counsel on brief contends that there is no credible evidence that Hatcher had a public outburst or refused to follow the direction of her supervisor; that this was another attempt to punish a union a union supporter on pretextual grounds; that other employees, including the antiunion employees in Assembly, frequently failed to wear a hairnet at all and there was no evidence of any other employees being reprimanded for not wearing hairnets; and that the real reason for this discipline was to harass Hatcher for her support for the Union, and accordingly, its issuance violated Section 8(a)(1) and (3) of the Act. *Teksid Aluminum Foundry*, 311 NLRB 711, 719–720 (1993). The Respondent on brief argues that it is an argumentative exaggeration to call the warning a "final warning"; that Hatcher had previously received a written warning for insubordinate and disrespectful behavior directed toward members of management as well as her peers; that Hatcher apologized to Herrmann saying, "I didn't mean to be sarcastic, I didn't mean for it to be a public outburst"; that in contradiction to her testimony about her apology, Hatcher testified that she had not been sarcastic and had not made a public outburst; and that in light of Hatcher's record of misbehaving in this fashion, her admitted resistance to the hairnet policy, her apologetic concession to Herrmann, and the lack of any evidence causally connection it to Hatcher's union activity, the warning was appropriate, legitimate and nondiscriminatory.

The November 9, 1998 written warning to Hatcher, as here pertinent, raises at least two questions. First, did Hatcher refuse to follow a reasonable direction of her supervisor? Second, did Hatcher engage in a public outburst? Technically, Hatcher did not refuse to follow a reasonable direction of her supervisor. Hatcher questioned the directive of her supervisor, pointing out that other employees did not have all of their hair up in a net or cap. Nevins did not report Hatcher for refusing to follow a reasonable directive. Rather Nevins, when Hatcher asked her if she had to do it, why didn't everyone else have to do it, told Hatcher that if she had a problem with that she could go see human resources. Hatcher went to human resources where she told Herrmann that some of the employees wore some of their hair outside the net or hat. Herrmann told her that she had to follow a reasonable order of her supervisor. At this point Hatcher did not refuse to follow a reasonable order of her supervisor. Did Hatcher then engage in a public outburst? Nevins said she did. But Nevins is not a credible witness. Herrmann did not testify so we do not know what he considered to be a public outburst. One is left with Hatcher's testimony, the Respondent's argument that Hatcher apologized for her conduct, the prior written warning, and the written warning for this incident. Contrary to the Respondent's argument on brief, Hatcher did not make an apologetic concession to Herrmann on November 5, 1998. What she said to Herrmann was that she was sorry that he felt that way, that she did not mean for it to be sarcastic and she did not mean for it to be a public outburst. At the trial herein Hatcher testified that in her view she did not

have a public outburst and she had not been sarcastic. This is not a contradiction. What happened was that Hatcher did not believe that it was a public outburst and she was not being sarcastic. As demonstrated by the prior warning incident, she did take her prior complaint to a "higher source," Ikenaga. So she was merely placing Herrmann on notice that she intended to appeal his ruling. What Hatcher was telling Herrmann was that she was sorry that he could not or would not understand what she had said and he choose to treat it as sarcasm. In other words, Hatcher was not sorry for what she said. Rather she was telling Herrmann that she was sorry that he choose to treat her statement as sarcasm when obviously she did not mean to be sarcastic. Here, unlike the prior situation, Hatcher did not allegedly refuse outright to do something. Here she questioned the directive and took Nevins up on her offer to have the situation reviewed by human resources. Was there a public outburst? Hatcher testifies no. Nevins testifies yes. Herrmann does not testify. Whether there was a public outburst is a subjective evaluation of the situation. But the Respondent did not provide the witness who made this subjective evaluation. Without being able to inquire as to the basis for this subjective evaluation, Herrmann's written conclusions are only enitiled to the weight one would give to written conclusions where one of the parties does not provide the means to ascertain the accuracy of the written conclusions. In view of the fact that Herrmann chose to treat Hatcher's conduct in the written warning as a refusal to follow a reasonable direction of her supervisor when I do not believe that this was a reasonable conclusion, I must question whether his conclusion that Hatcher had a public outburst was a reasonable conclusion. As noted numerous times above, Nevins was not a credible witness. So we are left with the testimony of Hatcher. Her testimony regarding what happened on November 5, 1998, is credited. Under *Wright Line*, supra, the General Counsel has demonstrated that Hatcher engaged in union activity, the Respondent knew that she engaged in union activity, there is significant antiunion animus on the part of the Respondent, and an adverse actions was taken against Hatcher. The Respondent has not met its burden of coming forward and demonstrating that the same action would have taken place notwithstanding the protected conduct. As for the Respondent's contention that it is an argumentative exaggeration to call the November 9, 1998 written warning a "final warning," it is noted that the warning indicates "[r]epetition of these acts, or any other acts which are inappropriate in the workplace are considered to be grounds for the issuance of corrective discipline, up to and including discharge." The language, in the circumstances extant here, is ambiguous. Ambiguity is held against the drafter. Here, I do not believe that the description is an argumentative exaggeration. The Respondent violated Section 8(a)(1) and (3) of the Act as alleged in paragraph 22 of the complaint.

Paragraph 23 of the complaint alleges that about March 17, 1999, the Respondent, by its agent, Paul Lefief, suspended and issued a written final warning to employee Peggy Heiden. The General Counsel on brief contends that as the second Board election approached, Respondent sought to discredit Heiden, who was a leader among union organizers, by suspending her and issuing her a final warning on March 23, 1999; that Nivens shoved Heiden twice in Bialy's office on March 17, 1999, and one of the shoves occurred when Heiden attempted to leave the office; that Nivens stopped blocking the door out of Bialy's office on March 17, 1999, only after Heiden yelled to the people outside the office window to get Bialy; that Bialy conceded that he did not interview the employees on Heiden's line on March 17, 1999, to see if she had actually reassigned the temporary; that the scope of the investigation was directed at Heiden's entire career and was a clear attempt to dig up harmful information against Heiden to besmirch her nearly spotless work record; that Respondent did not call supervisors Brodie or Ole or payroll coordinator Stevens, all of who were by the window to Bialy's office when the involved incident occurred, to testify at the trial herein regarding what they may have seen or heard; that Ole's statement to the Respondent omits what she told them regarding the incident; that Stevens modified her typed statement by adding "Sherry was holding the door so that Peggy could not get out," that later in Stevens' typed statement it is indicated that Stevens did not see Nevins place her hands on Heiden, which is contrary to what Heiden testified that Stevens told Heiden shortly after the incident occurred; that it can reasonably be inferred that Stevens did not sign the statement because it falsely stated that she had not observed the assault; that Heiden credibly denied ever having engaged in the misconduct attributed to her in the March 23, 1999 warning; that Heiden was never told the specifics with respect to these serious allegations and she was never given the opportunity to respond to them; that the allegations in the March 23, 1999 warning are pretextual, and this was demonstrated by the vague and generalized testimony Respondent offered in support of the alleged misconduct enumerated in the writeup; that there is overwhelming evidence that the motivation for issuing this final written warning to Heiden was to punish her and to send a message to other employees that those who supported the Union would be very harshly treated and their future employment would be in jeopardy; and that the Respondent failed to rebut this prima facie case of violation and did not establish that Heiden would have received this final warning and suspension notwithstanding her support for the Union.

The Respondent on brief argues that on March 17, 1999, "Heiden advised Bialy by telephone that she was making a criminal complaint against Nevins, which was implicitly confirmed in Bialy's conversation with Deputy Sheriff Opperman [Tr. 385–390, 478–491, 848–857, 1136–1144]." (R. Br. 51); that Heiden purposefully and deceptively interjected issues of criminality, necessitating a more complex, careful and time-consuming reaction from Respondent; that it merits repeating that we are dealing here with only a warning and not a firing or even the loss of a day's pay; that despite her unequivocal denial that she had told others she wanted to get rid of Nevins, Heiden did not rebut coworker Tammy Clark's recounting of two statements by Heiden to this very effect; that it is unnecessary to parse the evidence of who touched whom, who can corroborate whose account, and the like; that the Respondent's handling of this situation was, to be sure, somewhat impaired by personal agendas, differing perspectives, and the perceived criminal complaint, but Respondent brought the matter to a conclusion, and the problem has not resurfaced; that to suggest,

as the General Counsel does, that the warning to Heiden would chill union activity is truly an overstatement, "as the warning merely tells her not to do what she denies she has ever done or would ever do" (R. Br. 58); that the issue is not whether Respondent could have handled the situation more promptly, fairly, or completely but rather the issue is whether the General Counsel has established a violation of the Act; and that while it was an unfortunate episode, the record evidence as a whole does not establish a violation of the Act.

The Respondent violated Section 8(a)(1) and (3) of the Act as alleged in paragraph 23 of the complaint. Contrary to the Respondent's contention on brief, Heiden did not advise Bialy by telephone on March 17, 1999, that she "was making a criminal complaint against Nevins," and she did not "deceptively inject issues of criminality." And the Respondent's reaction was not careful. The Respondent did not interview the other employees on Heiden's line to determine whether there was even a reason for Nevins to take Heiden to the human resources office. The Respondent did not interview Heiden to ask her about the matters it raised in its final warning. Indeed, the Respondent did not even give Heiden notice and the opportunity to defend herself. Under *Wright Line*, supra, the General Counsel has demonstrated that Heiden engaged in union activity, the Respondent knew that she engaged in union activity, there is significant antiunion animus on the part of the Respondent, and an adverse action was taken against Heiden. Heiden's testimony regarding what happened is credited. Heiden testified that Steve Burnett, who was production manager and, therefore, over Nevins, told her that Nevins was not her supervisor. Indeed Nevins concedes that during their discussion Heiden told her that she was not her supervisor. Bennett did not testify so he did not deny telling Heiden that Nevins was not her supervisor. Lefief testified that he was aware that Heiden told Nevins that she was not her boss. Amazingly Lefief then testified that he did not know that Steve Burnett, who was the production manager, told Heiden that Nevins was not her supervisor anymore, and he did not believe that Nevins was ever removed from active duty out on the floor. In a "careful" investigation wouldn't these matters be resolved? Why didn't the person who conducted the investigation for the Respondent interview the other employees on Heiden's line, along with Heiden and Nevins? Nevins was not a credible witness. On direct she attempted to convey the impression that even after she spoke with Heiden twice (once in person on the line and once over the telephone) about keeping the temporary on the line, Heiden requested Nathan Iott to take the temporary back out of the area. The Respondent did not call Nathan Iott to testify. Nevins also attempted to convey the impression that she did not keep Heiden in Bialy's office against her will. The credible evidence of record indicates that Nevins did intentionally keep Heiden from leaving Bialy's office up until the time that Heiden started getting witnesses involved in what was happening. Only then did Nevins let Heiden leave the office. The credible evidence of record indicates that Nevins shoved Heiden twice in Bialy's office. Nevins denies this. She was not a credible witness. As Bialy testified, he and Lefief worked up a "game plan." In working up this "game plan" or "action plan," and defending it while they testified at the trial herein, both willingly gave up their credibility. As set forth above, Bialy just could not get it correct regarding what Clark allegedly told him with respect to who was going to get whom fired. And Clark could not remember telling Bialy what he says she told him. Both Lefief and Bialy testified that Heiden told the temporary to go somewhere else or reassigned the temporary employee herself. There is no credible evidence that this is what occurred. And while Bialy testified that what Clark told him could "possibly" be a motive behind what occurred, Clark did not remember telling him in March 1999 about what Heiden allegedly said. The fact that it may be "possibly" relevant to Bialy does not make it relevant to this proceeding. Moreover, Clark testified that she did not recall giving a signed statement to Bialy in March 1999 albeit she concedes that the signature on the statement is hers. Additionally only after direct, cross, and redirect did Clark testify about a second incident where Heiden allegedly said that she wanted to get rid of Nevins. As noted above, Clark could not remember whether she ever told Nevins about this second incident. Nevins did not testify about it. Bialy did, but this was after Clark testified and, as indicated above, Bialy just could not get it right. Also, as noted above Clark does not recall telling Bialy even about one incident let alone two. Even if it were relevant, Clark's testimony regarding what Heiden allegedly said about Nevins is not credited. Clark was not a credible witness. Bialy did not refute Heiden's testimony that Bialy told the deputy sheriff that what occurred on March 17, 1999, occurred because of union activity. What occurred after occurred because of the union activity of Heiden. Lefief testified that he wanted to send a message. He did. There was no proper business justification for what the Respondent did to Heiden regarding this matter. The Respondent has not met its burden of coming forward and demonstrating that the same action would have taken place notwithstanding the protected conduct. The Respondent violated the Act as alleged in paragraph 23 of the complaint.

Paragraph 24 of the complaint alleges that about March 18, 1999, the Respondent by its agent Gene Bialy, discharged its employee Robert Bomia. The General Counsel on brief contends that Bomia wore a union button, he told his supervisor, Kilburn that he was for the Union, he attended union meetings, and he advocated that other employees support the Union during his lunch period; that Bomia was treated more severely than Purkey, who was certified on the rail coil line, worked with Bomia on the line the night of Bomia's last shift, and was given an oral warning; that in the oral warning to Purkey, Kilburn indicated that they were unable to determine at what point the solder machine had failed during the shift; that Kilburn changed his testimony from they inspected all the parts to they inspected only one or two per pallet; that Kilburn changed his testimony about how long the solder was curling; that the oral warning to Purkey was prepared at 7:35 a.m. on March 18, 1999, and by 10 minutes later Kilburn was able to determine that it was Bomia's fault and he was terminated; that the oral write up to Purkey was not changed even though it was not given to Purkey until he reported for his next shift; that while Jeffers' personnel file contained an oral writeup for producing 688 pieces of scrap on rail coil assembly line because he failed to insure that all terminals were soldered, Bomia was fired because although

around 300 defective parts allegedly got by him and none had to be scrapped, Bomia was a union supporter; that other examples of disparate treatment include (1) Naugle, who although experienced, had repeated problems with the quality of his work and was given oral warnings, (2) Nellie Shaw who was issued an oral warning for failing to properly inspect parts, which resulted in 34 pieces of scrap being produced, and (3) David Lucie who received an oral warning for failure to properly inspect parts that also resulted in scrap being produced; that the overwhelming weight of the evidence indicates that Respondent had a progressive discipline policy, and that its practice was when employees had work quality problems the first step was to issue them an oral warning, but this policy was not followed with Bomia; that the Respondent is required to certify, as here pertinent, its assembly employees as a part of the quality control program and to retain copies of these documents; that it is not believable that when a union supporter was fired during a highly contested union organizing drive that this important document would be discarded; that Bomia credibly testified that he was never certified on the second position on the rail coil assembly line; that the never-ending probation which was not documented in Bomia's personnel file, along with the safety glasses and leaving his work area assertions were simply make-weight, pretextual reasons offered to justify his discharge; that Bomia was not properly trained for the involved job and he was fired after a 30-minute investigation; and that there is no evidence that any other employee was terminated for failing to properly inspect parts.

The Respondent on brief argues that the only motive for Bomia's discharge is failure to catch the improper solders; that even if the General Counsel establishes a prima facie case, the record evidence amply substantiates the legitimate nondiscriminatory reason for Bomia's discharge; that there is no evidence that Bomia engaged in union activity other than wearing a union button; that there was a serious integrity issue with Bomia regarding his time keeping while on overtime, generating windfall premium pay for nonworked time, which resulted in an open-ended extension of his probationary period; that Bomia continued with his noncompliance with the safety glasses rule after members of management repeatedly talked to him about it; that Bomia admitted that he made a false statement in a sworn affidavit about the job interview process; that while Bomia claims that he was not trained (certified) at the involved position, recognizing a solder problem is a rudimentary task common to all production lines; that there is evidence of record that Bomia was fully trained at the involved position; that there is no prior situation comparable to Bomia's blatant disregard of the rudimentary responsibilities of his job; and that "*Bomia conceded that he simply was not watching the terminals and the solder machine for a period of two to three hours*" (R. Br. 50) (emphasis in original and no transcript citation is provided).

Under *Wright Line*, supra, the General Counsel has demonstrated that Bomia engaged in union activity, the Respondent knew that he engaged in union activity, there is significant antiunion animus on the part of the Respondent, and an adverse action was taken against Bomia. Contrary to the Respondent's assertion, the record contains evidence that Bomia did more than wear a union button. Bomia spoke out in support of the union with his supervisor. He wore union T-shirts and he spoke with employees during lunch about supporting the Union. Additionally, Lefief testfied that he wanted to send a message with the final warning that he gave to Peggy Heiden just days later. According to Bialy, Lefief told him on March 18, 1999, that if Bomia could not provide a justification, he should be terminated. Lefief was the one who decided to terminate Bomia. Again Lefief wanted to send a message with the upcoming second election.

All involved knew that there were problems in the past with the solder on the rail coil line. Lefief himself testified about the fact that alarms were installed to indicate when the solder was not feeding. No one testified about an alarm going off. Kilburn testified that the machine has an alarm for the temperature of the solder. Kilburn also testified that the area where the solder was backed up was visible from station two on the rail coil line and that observing the soldering operation would be a part of the duties of the operator at the second station. But then Kilburn conceded that there was nothing in the work instruction sheet at the machine which instructs the operator at station two on the rail coil line that they have to check the solder cup to see if excess solder is dripping down. It would appear that the training one receives, therefore, is very important. Some of the Respondent's witnesses took the position that once an operator is trained on the workmanship standard for solder that would apply for all of the lines in assembly. If that is the case, wouldn't the same standard have applied with Jeffers in November 1998 when 688 pieces had to be scrapped because he failed to make sure that all terminals were soldered on this same line? Then it was attributed to a failure of design in process. Now apparently it is something else. And if the workmanship standard for solder on the ignition assembly line is the same as on the rail coil assembly line, why was it necessary, as Lefief testified, to retrain the employees on the second position on the rail coil assembly line to be more diligent on the inspection of terminals through the process? In late 1998, according to Lefief there were many defective coils because of soldering problems. Again it would appear that the training one receives on the second position on the rail coil assembly line is very important. What was Bomia's training on the second position of the rail coil assembly line? Bomia testified that he was not certified on the rail coil assembly line and he was not trained on any particular aspect of the second position of this line. Indeed he testified that the first time he worked the second position on this line was on the shift at the end of which he was fired. It should have been very easy to show that Bomia was not telling the truth, if that was the case. All the Respondent had to do was to produce the written certification with Bomia's initials on it. The Respondent produced Bomia's certification for the other lines. But it could not produce the certification in question. Nevins testified that if an employee completes training and is certified, she turns that certification over to human resources, and if the employee leaves the Respondent, she did not believe that it would be the prerogative of a supervisor to discard the certification. Nevins also testified that she has never discarded a certification because an employee left the Respondent. But this is exactly what Kilburn, who was just recently

given a supervisory position, claims he did. Had he ever done it before? Well yes but those instances involved short-term temporary employees who had just started the checklist and quit. In other words, Kilburn was unable to cite even one specific instance (other than his claim regarding Bomia) where an employee received their certification and he subsequently threw it out when they left the Respondent. So Kilburn had never done it before. Did this new supervisor seek guidance or get permission to discard a completed company document from someone in management or in human resources. Kilburn testified that he did not. He did not because he did not have a completed company document to discard in the first place. Kilburn was not a credible witness. Bomia was not certified. Kilburn's testimony regarding what training Bomia received on the rail coil line is not credible. At one point, Kilburn testified that he witnesses Bomia working at station 2 on the rail coil line and he was satisfied based on his personal observation of Bomia that he was proficient with respect to inspection and testing. This is in accord with Bialy's testimony that it was his observation that the training of Bomia on station 2 on the rail coil assembly line had been completed by Kilburn. This is also in accord with Lefief's testimony that when someone said that Bomia had not been trained on the station 2 job on the rail coil assembly line, Kilburn said that he had trained Bomia, Bomia had gone through the training and became a certified operator. Does this mean that when this issue came up it should have been clear to all involved that the certification was meaningful? If this happened before the time Kilburn claims he threw out the certification, would a reasonable person in these circumstances throw out that which he cites the existence of to prove his statement that Bomia was trained? If this happened after the time Kilburn threw out the certification, did Kilburn say "Oh! But I threw out the certification without asking if I could do this and without telling anyone in management at the time that I was doing this?" Lefief did not testify that Kilburn made this admission. Additionally, if Kilburn trained Bomia and he was satisfied through personal observation that Bomia was proficient, why did he, as he claims, ask Jeffers, when Bomia was working on the second station of the rail coil line, if Bomia was ready to be certified? If Kilburn asked Jeffers because he, Kilburn, did not personally train Bomia's or observe his training on the first station, then why didn't the Respondent call Jeffers to testify? Lefief was not a credible witness. Kilburn did not make the statements attributed to him by Lefief. Bomia was not certified on rail coil assembly line and Kilburn did not tell management that Bomia was certified. If it was an issue on St. Patrick's day, 1999 and Bomia was certified management would have retained the certification. But there was no certification to retain. Kilburn was not a credible witness.

Regarding the Respondent's assertion that "*Bomia conceded that he simply was not watching the terminals and the solder machine for a period of two to three hours*," Bomia conceded that he was not watching the area where the solder curled up because where the solder comes out of the spool up into the machine is more toward the bottom on the back side of the machine. Care must be taken in considering this argument of the Respondent. The Respondent's attorney asked Bomia when the problem was pointed out by Laura Iott on March 18, 1999, if he went and looked "at the place where the solder comes out of the machine and then goes to the joints between the terminal and the wire on the coil." (Tr. 191.) Bomia testified that he did and there was at least an hour or two of solder curled up but there was not enough for 3 hours. Bomia conceded that during the second half of the shift while he was at the second station he never watched the area where the solder curled up. He was not told or trained to watch this area. And the instructions on the machine do not direct him to watch this area. Again, Kilburn is not a credible witness. But contrary to the impression conveyed by the Respondent on brief, Bomia never conceded that he did not watch (or inspect) the terminals which were soldered on the rail coil units. Indeed, Bomia testified credibly that he did inspect the solders but as it turns out he did not fully appreciate what he should have been looking for. Undoubtedly, neither did Jeffers earlier. Since interrogation about his feelings regarding a union was part of Bomia's interview process (verbal), his indication in his affidavit that the interrogation about his feelings regarding a union occurred during the written portion of the interview process is understandable. In my opinion this was nothing more than a mistake. There is credible evidence of record that this type of question was asked of at least one other applicant during the interview process. Lefief's testimony that some of the units did not have any solder at all is not credited. Lefief was not a credible witness. No credible witness made this assertion. And Lefief never fully explained why he was willing to give Naugle a break, taking into consideration the fact that Naugle was in training, when he would not give Bomia, who was in training, a break. Perhaps Bomia was not viewed as a "loyal" employee and Naugle, after he no longer supported the Union, was viewed as a loyal employee. Bomia testified that during the second half of the shift while he worked at the second station he inspected 170 of the 340 units manufactured during the entire shift. Kilburn, who was not a credible witness, eventually testified that a representative sampling indicated that there were solder problems with 300 units. The employee who worked the second station during the first half of the involved shift and who was certified on that machine, received an oral warning. There was no proper business justification for what the Respondent did to Bomia regarding this matter. The Respondent had not terminated Bomia up to this point. What occurred with the rail coil assembly machine on March 18, 1999, would not justify changing the position that the Respondent had taken about Bomia previously. The Respondent has not met its burden of coming forward and demonstrating that the same action would have taken place notwithstanding the protected conduct and notwithstanding its desire to send a message to the employees before the upcoming second Board election. The Respondent violated the Act as alleged in paragraphs 24 of the complaint by discharging Robert Bomia because employees engaged in activities on behalf of and in support of the Charging Party and to discourage employees from engaging in this and other concerted activities.

The General Counsel on brief contends that the Regional Director properly set aside the settlement agreement in that within a few weeks of the Regional Director's approval of the settlement agreement on February 1, 1999, the Respondent violated its express terms; that in the settlement agreement, the Respon-

dent agreed not to (a) take adverse action against, counsel or otherwise discriminate against employees because of their activities on behalf of or in support of the Union or because of their protected concerted activities, (b) coercively interrogate employees about their activities on behalf of or in support of the Union or other protected concerted activities, (c) threaten employees with loss of employment or unspecified reprisals because of their activities on behalf of or in support of the Union or other protected concerted activities, and (d) engage in surveillance of our employees' activities on behalf of or in support of the Union, or create the impression of surveillance; that when Nevins interrogated employee Ryan Clark, made implied threats of reprisals for engaging in union activities in late February or early March 1999, and created the impression that employees' union activities were under surveillance, the Respondent breached the settlement agreement; and that the Respondent also violated the agreement by suspending Peggy Heiden on March 19, 1999, issuing her a final warning on March 23 because of her union activities, and by discharging Robert Bomia on March 18, 1999, because of his union activities.

The Respondent on brief argues that the settlement of the original proceeding was documented through a standard NLRB settlement agreement signed by the Union, Respondent, and the Regional Director; that a stipulation to set aside election and agreement to conduct second election was signed only by the Union and the Respondent, and in it these parties waived any rights to which they were entitled under the Act or the Board's Rules and Regulations to any hearing, to a Regional Director's report or to a Board decision in "this" matter (The Respondent can only be referring to Case 7–RC–21338.); that even though the General Counsel now contends that August 14, 1998, was the trigger date for a bargaining obligation, it is undisputed that there was no request, demand or other signal that the Union claimed bargaining rights based on a card majority; that while the Respondent recognizes the General Counsel's theoretical ability to vacate an informal settlement agreement in an unfair labor practice case that has been dishonored by a party, *R. T. Jones Lumber Co.,* 303 NLRB 841, 843 (1991), this case is materially different because of the separate bilateral Stipulation in the representation case; and that the legal standard for vacating a settlement agreement in an unfair labor practice case has not been satisfied.

A Regional Director has the authority to reinstate a charge following noncompliance with a non-Board settlement agreement, notwithstanding Section 10(b) of the Act, provided the original charge was timely filed. *Norris Concrete Materials*, 282 NLRB 289, 291 (1986), and *Jonko, Inc.*, 316 NLRB 413, 416 (1995). Here, the Regional Director approved the settlement agreement in the unfair labor practice case. The fact that he was not a party to the private stipulation for a rerun election does not preclude him setting aside the dishonored agreement in the unfair labor practice case. Section 3(d) of the Act provides, in pertinent part, that the General Counsel of the Board "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaint and in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board." The Respondent negated the terms of the settlement agreement approved by the Regional Director. And the Respondent did it in a cold, calculated, and contemptuous fashion. The Respondent did not intend to abide by the terms of the approved agreement. Among other approaches, it used Nevins to undermine the approved agreement. Management knew what Nevins was doing. And even when Nevins went way over the line with Peggy Heiden in Bialy's office, the Respondent used the opportunity to further undermine the approved agreement and to undermine support for the Union 6 weeks before the scheduled second Board election. The Regional Director acted well within his discretion and in the public interest in deciding to vacate the approved settlement agreement and issue the second amended consolidated complaint.

Paragraph 26 of the complaint alleges that the acts and conduct described above in paragraphs 8–25 are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight and the employees' sentiments regarding representative, having been expressed through authorization cards would, on balance, be protected better by issuance of a bargaining order in an appropriate unit described above, than by traditional remedies alone. The General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices herein alleged. The General Counsel on brief contends that as of August 14, 1998, the Union had obtained valid signatures on its authorization petition from 38 of the 71 employees in the proposed bargaining unit as of August 14, 1998; that the Respondent caused the Union to lose its majority support with threats of reprisals, plant closure, and loss of employment, with coercive interrogation, and with discipline of union supporters; that while the Respondent agreed to settle certain unfair labor practices in Case 7–CA–41236, and agreed to a second election, before the ink was dry on the settlement, the Respondent continued with its unlawful campaign by interrogating employees, creating the impression of surveillance, and making veiled threats of reprisal; that the unfair labor practices reached a crescendo 6 weeks before the scheduled rerun election with the discharge of open union supporter Bomia and with the suspension and final warning of lead union activist Peggy Heiden; that Lefief admitted that he was trying to send a message to the employees with Peggy Heiden's discipline and her final warning was widely disseminated among employees in the plant; that since the Respondent continued to commit "hallmark" unfair labor practices following the election on September 24, 1998, and following its entering into the settlement agreement and the agreement for a rerun election, there is a strong likelihood that the Respondent will continue to engage in such unfair labor practices in the future; and that in such circumstances, the courts and the Board have found that there is little likelihood of conducting a fair election and a bargaining order is an appropriate remedy. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *M. J. Metal Products,* 328 NLRB 1184 (1999); *Garvey Marine, Inc.*, 328 NLRB 991 (1999); *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999); *Coil-ACC, Inc.*, 262 NLRB 76 (1982), enfd. 712 F.2d

1074 (6th Cir. 1983); *Douglas Foods Corp.*, 330 NLRB 821 (2000).

The Charging Party on brief argues that the Court in *Gissel*, supra at 612, stated that "a bargaining order is designed as much to remedy past election damage as it is to defer future misconduct"; that in *Gissel* category II cases the Board considers "hallmark" violations such as threats to close a plant, the unlawful discharge of union supporters, and threats of termination; that the Board also considers the extent of the dissemination of knowledge of the unfair labor practices in the light of the size of the involved unit; that additionally consideration is given to timing of the unfair labor practices, evidence that the unfair labor practices have caused employees to avoid union activities, and the likelihood that the employer will again violate the Act, *Joy Recovery Technology Corp*., 320 NLRB 356, 368 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); and *General Fabrications Corp*., 328 NLRB 1114 fn. 17 (1999); that a crescendo of antiunion activity was reached 6 weeks before the scheduled rerun election when Nevins assaulted Peggy Heiden on March 17, 1999, Bomia was fired on March 18, 1999, and Heiden was suspended and later given a "sham" final warning as the result of an "investigation" conducted by the Company's antiunion consultant; that as a result of the Company's antiunion activity, Hatcher ceased her membership on the VOC, and whereas at the beginning of the campaign about 30 employees wore UAW insignia in the plant, at the time of the hearing herein only 2 or 3 employees continued to wear union insignia; and that

> [t]his Employer has amply demonstrated that it had no intention of permitting its workers to freely choose, or not choose, union representation. This Employer has confirmed repeatedly that it has no regard for the Act or its workers' rights under the Act. *Gissel* relief is appropriate in few cases. It is a difficult remedy to acquire. But on this record, *Gissel* relief is supported and required to enforce the rights of Diamond Electric workers. [CP Br. 57.]

The Respondent on brief cites *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1110 (6th Cir. 1994), for the proposition that "[a] bargaining order . . . is an extraordinary remedy that we 'scrutinize very closely' when imposed by the Board without a new election." It is pointed out that the Sixth Circuit Court of Appeals, in *NLRB v. Taylor Machine Products, Inc.*, 136 F.3d 507, 519 concluded that "[i]n the end, the Board must determine that a bargaining order is the 'only satisfactory remedy.'" The Respondent contends that as preconditions for a bargaining order, the General Counsel must prove that "the Union in fact has obtained authorization cards from a majority of employees in an appropriate bargaining unit . . . and has requested bargaining." *DTR Industries, Inc. v. NLRB*, 39 F.3d 106, 112 (6th Cir. 1994), and *Gourmet Foods, Inc.*, 270 NLRB 578 (1984); that the Union has never requested bargaining of the Respondent and the July 30, 1998 flyer the employees gave to Ikenaga does not constitute a demand for bargaining; that General Counsel authenticated less than half of the 38 signatures with testimony of either the signer or a witness; that more that one half of the signatures would have to be authenticated with exemplars and the General Counsel "will presumably ask the ALJ to authenticate the signatures on the UAW petition forms on that basis" (R. Br. 61); that as pointed out by the court in *BE-LO Stores v. NLRB*, 126 F.3d 268, 2792 80 (4th Cir. 1997), in rejecting a *Gissel* bargaining order, even a minor use of these unorthodox authentication methods "contribute[s] to our concern that the Union's majority status was one of agency construct rather than grass roots support"; that even if all doubts and issues were resolved in the General Counsel's favor, any majority status within the unit was marginal and short-lived; that a majority of the supervisors named in the complaint are no longer working for the Respondent; that paid leave for Peggy Heiden can hardly be perceived as "iron fisted," it was not shown that the warning to Peggy Heiden had any demonstrable impact on the unit as a whole, and Heiden and not the Respondent's management sent the message to the other employees; that the General Counsel has not demonstrated that alleged unfair labor practices dissolved the Union's majority of 38 signers in that in the first election the Union received 27 "yes" votes, five of the signers ended their employment with the Respondent and a sixth signer, Kilburn, was promoted out of the unit into supervision on September 8, 1998; that what occurred with Peggy Heiden and Bomia in March 1999 could not have caused a loss of support in August-September 1998; and that until May 1999 the Union had not raised the thought of *Gissel* bargaining order relief and the only developments in 1999 are the discharge of Bomia and the warning to Peggy Heiden, two discrete events affecting only two employees in what had become a 118-person unit, would not have such an impact as to render a free and fair election impossible.

Contrary to the Respondent's assertion on brief, Hatcher asked Ikenaga to recognize the Union on July 30, 1998, during the meeting he held for employees in the lunchroom. Also contrary to the Respondent's assertion on brief, the General Counsel authenticated more than (not less than) one-half of the 38 signatures with testimony of either the person who signed or a witness. More specifically, the General Counsel requests that 14 signatures be authenticated with exemplars. The Respondent's assertion on brief that the General Counsel "will presumably ask the ALJ to authenticate the signatures . . . on that basis" is disingenuous at best. The Respondent's counsel stipulated that the exemplars for "handwriting examples from the name[d] employees that were taken form the Company's personnel files." (Tr. 1074.) From a common sense standpoint it should be noted that the Respondent could have called its own handwriting expert if it believed that any of the relevant signatures was other than what it purports to be. The Respondent did not call a handwriting expert so one can reasonably conclude that it was determined by the Respondent (perhaps after showing the signatures to a handwriting expert) that the signatures were authentic and no purpose would be served by calling its own expert, other than to deprive the Respondent of an meritless argument it could later use. After comparing the exemplars (admittedly authentic specimens) with the involved signatures on the Union's authorization petition introduced herein, it is my opinion that the signatures of the following employees on the Union's authorization petition are authentic: David Courter, Kevin Crego, Tina Domansky, Jill Edson, Charles Fetterman, Bryan Kilburn, Chad Naugle, Janelle Ost, Yaseni Pilbean,

Douglas Russ, Brian Schwartz, Barbara Shier, Lois Shroyer, and Todd Stoner. *Traction Wholesale Center Co.*, 328 NLRB 1058 (1999). Those signatures, in addition to the 24 signatures authenticated by credible testimony, gave the Union a majority of 38 out of 71 employees going into the first election.

In *Gissel*, supra, the Supreme Court identified two types of employer misconduct that may warrant the imposition of a bargaining order. The second type, the so-called "category II" cases, involve less than outrageous pervasive unfair labor practices as long as the practices have a tendency to undermine majority strength and impede the election process. In fashioning a remedy, the Supreme Court at 614 and 615 in *Gissel*, supra, indicated that he Board could

> properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

The unfair labor practices committed in this case include the so-called "hallmark" violations such as discharge, suspension, threats of job loss and plant closure, and the futility of a union victory. Obviously, this would have a coercive effect on both the employees involved and the employees who became aware of these transgressions.

The Respondent's argument that a majority of the supervisors named in the complaint are no longer with the Respondent must be viewed in the light of the fact that the supervisor who (a) spearheaded the Respondent's antiunion effort, (b) engaged in numerous unfair labor practices, (c) tried to coerce a member of the VOC to discuss the Union or face a charge of insubordination, (d) kept a female employee in an office against the employee's will, and (e) assaulted a female employee, is not one of the supervisors who is no longer with the Respondent.

The thing about the Respondent's approach to employee relations that should cause concern is that instead of reaching a reasonable resolution to the Nevins-Peggy Heiden incident in Bialy's office, the Respondent, apparently with the advice of its lawyer/consultant, gave its tacit approval to Nevins' egregious misconduct and further victimized the union supporting victim, Peggy Heiden. And the so-called "investigation" of the Nevins/Peggy Heiden incident was done over a period of time by the Respondent with the help of a lawyer/consultant who had to fully appreciate the ramifications on the upcoming Board election. In other words, the April 1999 rerun election was the second bite of the apple, and the Respondent did not care that it was undermining the ability of its employees to have a fair election. The Respondent unlawfully fired one employee and it unlawfully victimized another employee. Indeed the Respondent wanted to send a message to other employees. The assault by a supervisor of a female employee was witnessed. That incident and the aftermath will be remembered by employees for years to come. Instead of defusing, the Respondent intentionally stoked the situation with a purpose in mind. Would it be reasonable to conclude from the Respondent's past conduct that it would care about sabotaging a third bite of the apple? With an employer like the Respondent, there is no way to ensure a fair election. The only satisfactory approach is a bargaining order.

With respect to employees' Section 7 rights, the Supreme Court in *Gissel*, supra at 612, 613, has already considered this as follows:

> In view of the Board's power, they [the employer] conclude, the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' [Section] 7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage [32] as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.[33] There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may, . . . upon a proper showing, take stops in recognition of changed situations which might make appropriate changed bargaining relationships."

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[32] The employers argue that the Fourth Circuit correctly observed that, "in the great majority of cases, a cease and desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity." *NLRB v. Logan Packing Co.*, 386 F.2d at 570. It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of . . . Section 10(e) of the Act (29 U.S.C. . . . [Sec.] 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore e given special respect by reviewing courts. See *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo v. FMC*, 383 U.S. 607, 621 (1966).

[33] It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees in the face of

> a hostile employer, in order to survive the threat of a decertification election after a year has passed." Bok, the Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 135 (1964).

Regarding turnover, as noted above, the supervisor who had the greatest and far reaching unlawful impact remains. And with respect to employee turnover, not only did the Respondent not right a witnessed severe wrong by a supervisor to a union activist but, with premeditation, it further victimized the union activist victim. This was widely disseminated among employees and it will be discussed among employees for years to come.

The Respondent has demonstrated twice now that it will not hesitate to destroy the laboratory conditions necessary for a fair election.

Perhaps someone might argue that notwithstanding the Respondent's past conduct, it should be given additional bites of the apple. I believe that the Respondent has amply demonstrated its intentions. In my opinion, a *Gissel* bargaining order is an appropriate and necessary remedy in this case.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) By its agent, Sherry Nevins, at its Dundee facility, about August 1, 1998, (1) coercively interrogated employees on two occasions about their activities on behalf of and in support of the Charging Party, and (2) threatened an employee on one occasion with loss of employment if the employees chose to be represented by a labor organization.

(b) About August 8, 1998, Nevins threatened employees with unspecified reprisals if they chose to be represented by a labor organization.

(c) About August 10, 1998, Nevins (1) coercively interrogated employees about their activities on behalf of and in support of the Charging Party, (2) created the impression among its employees that their activities on behalf of and in support of the Charging Party were under surveillance, by telling employees it was watching them, and (3) orally promulgated a new work rule prohibiting employees from congregating and leaving their assigned departments.

(d) About September 4, 1998, Nevins (1) coercively interrogated employees about their activities on behalf of and in support of the Charging Party, and (2) orally promulgated an overly broad work rule that prohibited employees from talking to one another about the Charging Party during working hours.

(e) About August 1998, Respondent, by its agent, Mardi Reid, at its Dundee facility, created the impression among its employees that their activities on behalf of and in support of the Charging Party were under surveillance by telling them they were wandering in the plant, talking to unauthorized persons and over staying their breaks.

(f) About September 1998, the Respondent, by its agent, Jerry Folmer, at its Dundee facility, (a) coercively interrogated employees on two occasions about their union activities on behalf of and in support of the Charging Party, and (b) created the impression among its employees that their activities on behalf of and in support of the Charging Party were under surveillance by telling them it had heard from a supervisor that they were "salts."

(g) About September 10, 1998, the Respondent, by its agent, Don Lynch, at its Dundee facility, harassed its employees by telling them that their coworkers had raised concerns about their work performance, then later telling them that it would not charge them with these offenses because of a lack of documentation.

(h) By its agent, Tanya Brodie, at its Dundee facility on September 28, 1998, and in mid to late October 1998 coercively interrogated an employee as to his/her support for and sympathies on behalf of the Charging Party.

(i) Since August 3, 1998, the Respondent has maintained an overly broad no-solicitation rule at its Dundee facility, which provides:

> We recognize that team members may have interests in events and organizations outside the workplace. However, team members may not solicit or distribute literature concerning those activities during working time or in working areas.

4. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act:

(a) About August 1998, the Respondent, by its agent, Joe Bitz, at its Dundee facility, changed the breaktimes of employee Shannon Ruetz.

(b) About September 8, 1998, the Respondent by its agent, Sherry Nevins counseled employee Peggy Heiden pursuant to an overly broad rule that prohibited employees from talking to one another about the Charging Party during working hours, and memorialized this counseling in writing.

(c) About September 10, 1998, the Respondent, by its agent, Don Lynch, transferred employee Janice Hatcher to a new department.

(d) About November 1998, and continuing to date, the Respondent by its agents, had engaged in general harassment of its employees Peggy Heiden and Janice Hatcher.

(e) About November 1998, and continuing to date, the Respondent by its agent, Sherry Nevins, has harassed its employees Peggy Heiden and Janice Hatcher, by its discriminatory enforcement of its rules with respect to dress codes and safety glasses; assignment of work duties; monitoring of work, and more rigorous work and conduct standards.

(f) About November 5, 1998, the Respondent, by its agent J. W. Herrmann, issued a written reprimand and final warning to employee Janice Hatcher.

(g) About March 17, 1999, the Respondent, by its agent, Paul Lefief, suspended and issued a written final warning to employee Peggy Heiden.

(h) About March 18, 1999, the Respondent by its agent, Gene Bialy, discharged its employee Robert Bomia.

(i) By taking the actions described above in paragraphs 4(a) through (h) because employees engaged in activities on behalf of and in support of the Charging Party and to discourage employees from engaging in this and other concerted activities.

5. In view of the fact that it is not possible to have a fair election, it is appropriate and necessary to order the Respondent to bargain with the Union as of August 14, 1998, when the Union attained a majority and had requested the Respondent to recognize it

6. Respondent has not violated the Act in any other manner.

THE REMEDY

Having found that the Respondent has engaged in a number of unfair labor practices, I shall recommend that the Respondent be ordered to cease and desist from committing these unfair labor practices and take certain affirmative actions designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Robert Bomia, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent will be required to expunge from its records the September 8, 1998 writeup to Peggy Heiden, the November 9, 1998 written reprimand to Janice Hatcher, the March 23, 1999 final warning to Peggy Heiden, and any reference to the unlawful discharge of Robert Bomia.

I shall be recommend that Respondent recognize and bargain with the Union, on request, and embody any understanding reached into a signed agreement.

In view of the degree and pervasiveness of the unfair labor practices, a broad cease-and-desist order shall be recommended precluding Respondent from "in any manner" interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

[Recommended Order omitted from publication.]